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In the Supreme Court of the United States

OCTOBER TERM, 1977

GRIFFIN B. BELL, ET AL., PETITIONERS

v.

LOUIS WOLFISH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the Attorney General of the United States, the Director of the Bureau of Prisons, and the Warden of the Metropolitan Correctional Center, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-37a) is reported at 573 F.2d 118. The opinions of the district court (Apps. F and G, *infra*,

pp. 74a-225a) are reported at 428 F. Supp. 333 and 439 F. Supp. 114.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 38a-39a) was entered on January 24, 1978. On April 14, 1978, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 24, 1978. On May 15, 1978, Mr. Justice Marshall further extended the time for filing a petition for a writ of certiorari to and including June 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that every "restriction and deprivation" imposed on persons detained in federal custody pending trial on criminal charges ("pretrial detainees") must be justified by a "compelling necessity."

2. Whether the housing provided to pretrial detainees at the Metropolitan Correctional Center is reasonable in light of valid governmental objectives and is constitutionally sufficient.

3. Whether the governmental interest in maintaining jail security and order justifies rules that (a) prohibit receipt at the jail of packages containing items of food or personal property; (b) prohibit receipt at the jail of books and magazines that are not mailed directly from publishers; (c) require inmates

to expose body cavities for visual inspection as part of the search conducted after contact visits with persons from outside the detention center; and (d) authorize routine inspections of the rooms of pretrial detainees in their absence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. 3041 provides in part:

> For any offense against the United States, the offender may, by any justice or judge of the

United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of the common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * *

18 U.S.C. 4042 provides in part:

The Bureau of Prisons, under the direction of the Attorney General, shall—

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States * * *.

STATEMENT

1. The federal Metropolitan Correctional Center (MCC) is located in New York City adjacent to the Foley Square courthouse. The primary objective of the MCC is to house persons who are being detained in custody prior to trial for federal criminal offenses

in the Southern and Eastern Districts of New York and the District of New Jersey. In addition, the MCC houses some convicted inmates who are awaiting sentencing or transportation to federal prison or who are serving their sentences in a service capacity at the MCC (App. A, *infra*, pp. 4a-5a; App. G, *infra*, pp. 200a-202a).

The MCC was constructed in 1975 to replace the aging federal West Street facility, which had been in use in New York City since 1928. At the time the MCC was designed, it was intended to incorporate the most advanced and innovative features of modern correctional design. As the court of appeals stated, "it represented the architectural embodiment of the best and most progressive penological planning" (App. A, *infra*, p. 4a). The key design element of the facility is the modular or unit concept, in which a number of self-contained residential units replace the traditional cellblock jail construction. Each unit consists of approximately 48 private rooms (or six larger dormitory rooms) adjoining or opening onto common multipurpose rooms to which the detainees have free daytime access.[1] The common areas include facilities for food preparation and dining, receiving visitors, recreation and education. By eliminating any need for frequent, scheduled movements of detainees into different functional areas of the facility, it was expected that the modular design would "humanize staff-

[1] The period of free access varies from 16 to 19 hours per day (App. A, *infra*, p. 4a).

inmate relations and provide a more 'homelike' atmosphere, affording inmates greater privacy and freedom than jails of earlier construction" (App. A, *infra*, pp. 4a-5a).[2]

2. Initial plans for the MCC provided for a capacity of approximately 400 inmates, or an increase of one-third over the West Street facility (A. 2376-2377).[3] These plans were later revised and expanded so that at the time the MCC opened the planned capacity was 449 inmates, or approximately 50 percent greater than at the old jail (App. A, *infra*, p. 6a).

Just prior to the opening of the MCC, the number of persons committed to pretrial custody began to rise at an unprecedented rate (*ibid.*). The Bureau of Prisons employed several measures in an effort to manage the unexpected flow of persons committed to the MCC. The Bureau located persons awaiting deportation proceedings at other federal facilities and eliminated the planned community treatment center, or "half-way house," at the MCC (A. 1657).[4] The Bureau also arranged to expedite the transfer of in-

[2] As the court of appeals noted, the residential atmosphere of the facility is enhanced by carpeting and by clear exterior windows without bars (App. A, *infra*, p. 5a).

[3] "A." refers to the Joint Appendix in the court of appeals. The population at the West Street facility had been 285-300 inmates (A. 2122, 2375).

[4] These changes provided 108 additional spaces for the housing of pretrial detainees and convicted inmates at the MCC (A. 1266-1267, 2501-2502, 2521-2522).

mates to prisons upon sentencing and contracted with private half-way houses for additional bedspace (A. 1483-1485, 1188).

Despite these efforts, however, the inmate population at the MCC began to rise above its planned capacity within a short time after its opening. In November 1975, in order to provide sleeping space for this increased number of inmates, the MCC began to replace single beds with bunk beds in some of the residential rooms used to house pretrial detainees (A. 124-125).[5] Similarly, the Bureau installed bunk beds in the dormitory rooms in order to double the capacity of those areas (A. 1184-1185). During brief periods of unusual influx of persons into the facility, a small number of detainees and inmates were provided with temporary sleeping space in the common areas of the modular units (A. 2528, 1040-1041). These persons were transferred to residential rooms as soon as space became available (A. 2529).

3. On November 28, 1975—less than four months after the MCC was opened—Louis Wolfish initiated this action by filing a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of New York. The petition alleged that overcrowding and other conditions at the MCC

[5] The district court correctly noted that 121 of the 389 residential rooms had been "designated" for double-occupancy as of the time of its decision (App. G, *infra*, p. 203a; A. 177). The number of rooms actually housing two inmates, however, did not exceed 73, and, of these, only 35 were rooms in units designated to house pretrial detainees (A. 124-125, 82).

made the confinement at that facility unconstitutional.[6] The district court subsequently certified the case as a class action on behalf of all persons confined at the MCC (App. A, *infra*, p. 7a). The litigation has thus simultaneously implicated the rights of both pretrial detainees and convicted inmates with regard to the conditions of their confinement.

In its two opinions and several orders in this case, the district court declared unlawful and enjoined no fewer than 20 separate aspects of the MCC administration. In analyzing the various challenges to conditions of confinement at the MCC, the district court applied the following legal standards:

(i) Since detainees must be presumed innocent until proven guilty, and since the sole justification for their confinement is custody and not punishment, the Due Process clause requires that "any deprivation or restriction of * * * rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity" (App. F, *infra*, p. 89a, citing *Detainees of Brook-*

[6] The petition, as amended, alleged a multitude of constitutional violations at the MCC. These included, *inter alia*, overcrowding; undue length of confinement; monitoring of personal mail; improper strip searches after contact visits; inadequate visiting hours; inadequate access to legal materials; inadequate recreational, educational and employment opportunities; inadequate telephone service; restrictions on religious freedoms; restrictions on the purchase and receipt of items of personal property; inadequate and unsanitary food; objectionable uniforms; poor ventilation; insufficient staff; unannounced transfers; and inadequate services for non-English speaking inmates (App. A, *infra*, pp. 7a-8a and n. 7).

lyn House of Detention v. *Malcolm*, 520 F.2d 392, 397 (C.A. 2); *Rhem* v. *Malcolm*, 507 F.2d 333, 336-337 (C.A. 2));

(ii) The Bureau of Prisons' enabling legislation creates duties to "care" for prisoners and to provide prisoners with "suitable quarters," 18 U.S.C. 4042, 4081, and these duties are enforceable to prevent "arbitrary" and "capricious" maladministration (App. F, *infra*, pp. 83a-84a); and

(iii) The Eighth Amendment requires that convicted inmates at the MCC be treated equally with detainees in terms of essential living conditions because it would be "cruel and unusual" to treat them as an "inferior minority" at the MCC (App. G, *infra*, p. 213a);

Applying these standards, the court held unlawful and enjoined the double-bunking of pretrial detainees in a single cell (App. G, *infra*, pp. 207a-212a) and the doubling of sleeping facilities in the dormitory rooms (App. F, *infra*, pp. 121a-126a). The court found that the crowding resulting from the use of bunk beds in these areas abridged the inmates' rights to privacy and decent accommodations, was not justified by any sufficient governmental interest, and was therefore unconstitutional (App. F, *infra*, pp. 116a-121a; App. G, *infra*, p. 211a).[7]

[7] The court similarly enjoined the MCC from providing even temporary sleeping facilities in the common areas at the detention center (App. F, *infra*, p. 116a). The use of double-bunking procedures for convicted inmates at the MCC was stricken under the Eighth Amendment, on the theory that it would be cruel and unusual to treat prisoners as an "inferior minority" at the facility (App. G, *infra*, p. 213a).

The court also held unlawful under the Due Process Clause and Bureau of Prisons legislation several other aspects of confinement at the MCC that the court found to be unduly restrictive.[8] For example, the court enjoined MCC regulations concerning limitations on visits from family, friends, attorneys and co-defendants (App. F, *infra*, pp. 129a-140a); limitations on telephone service and commissary privileges (*id.* at 111a-115a, 140a-143a); limitations on the use of the visiting room bathroom (*id.* at 134a-135a); prohibitions against receipt of packages containing food and items of personal property by inmates (*id.* at 162a-166a); and requirements for the use of an inmate uniform (*id.* at 166a-169a). The court also affirmatively required the MCC to increase the materials available in a law library at the facility (*id.* at 102a-106a) and enjoined the MCC from retaining any detainee or inmate at the facility for a period in excess of 60 days without the inmate's written consent (*id.* at 96a-98a).

In addition to the holdings based on the Due Process Clause and the Bureau of Prisons legislation, the district court found other practices at the MCC to violate specific constitutional guarantees applicable to both pretrial detainees and convicted inmates. The court held that the First Amendment rights of persons confined at the MCC were violated by the random inspection of letters mailed out of the facility, and by

[8] The district court did not indicate in each case whether it was relying on a statutory or constitutional basis for its various holdings.

the MCC rule that prohibits receipt of any books and magazines that are not mailed directly from "publishers only." The court refused to accept the security justifications argued in support of these two practices (App. G, *infra*, pp. 215a-216a, 221a-222a). The court also held that the requirements that (i) detainees remain outside their rooms during routine inspections,[9] and (ii) detainees and convicted inmates expose their body cavities for a visual inspection following contact visits, are not justified by a sufficient governmental interest in security or prison administration. The court held that the former of these two practices violates the retained right of privacy of pretrial detainees, and the latter constitutes an unreasonable search in violation of the Fourth Amendment (App. F, *infra*, pp. 147a-157a).

4. On appeal, the Second Circuit largely affirmed the district court's holdings under the Due Process Clause, but rejected the district court's reliance on the Eighth Amendment and the Bureau of Prisons legislation.

With regard to the Eighth Amendment, the court of appeals stated that

> [a]n institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety.

[9] The court did not strike the MCC rule requiring convicted inmates to vacate their rooms during routine inspections (App. F, *infra*, p. 157a).

App. A, *infra*, p. 13a, citing *Newman* v. *State of Alabama*, 559 F.2d 283, 291 (C.A. 5). The court of appeals rejected the district court's reasoning that it is cruel and unusual to house prisoners in conditions worse than detainees are housed in the same facility, and remanded for the district court to determine whether the housing for convicted inmates at the MCC was "adequate" (App. A, *infra*, pp. 19a-20a).

With regard to the enabling legislation of the Bureau of Prisons, the court of appeals noted that these statutes confer broad discretion on the Attorney General to safekeep and care for inmates. The court concluded that the administration of federal prisons constitutes "agency action * * * committed to agency discretion by law" and is therefore exempted from judicial review by the Administrative Procedure Act, 5 U.S.C. 701(a)(2) (App. A, *infra*, pp. 14a-15a). The court of appeals therefore reversed the district court's determination that certain conditions of confinement at MCC violated the Bureau of Prisons' enabling legislation.[10]

With regard to the scope of protection afforded pretrial detainees by the Due Process Clause, the court of appeals indicated that the district court had articulated the correct standard but had misapplied the standard in some situations. The court reiterated the

[10] On this basis, the court of appeals reversed the district court's holdings that the bathroom in the visiting area must be kept unlocked, and that prison authorities must make local and long-distance telephone service available to MCC inmates (App. A, *infra*, pp. 15a-17a).

Second Circuit's view that pretrial detainees may be subjected to "only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration'" (App. A, *infra*, p. 12a, quoting *Rhem* v. *Malcolm*, *supra*, 507 F.2d at 336; *Detainees of the Brooklyn House of Detention* v. *Malcolm*, *supra*, 520 F.2d at 397. The court stated that neither fiscal necessity nor administrative convenience could constitute a compelling justification for intrusive regulation (App. A, *infra*, p. 12a). At the same time, however, the court indicated that where the institution's "legitimate interests in security" are involved, the court should be deferential and not "second-guess the expert administrators on matters on which they are better informed" (*id.* at 12a-13a).

The court evidenced little difficulty in applying this complex standard. For example, on the issue of double-celling of detainees, the court concluded simply that "no showing of compelling necessity" had been made to justify the invasion of personal privacy involved (*id.* at 17a). Applying the same analysis, the court held that double-bunking in the dormitory areas was unjustified, but remanded for the district court to determine "whether any number of inmates in excess of rated capacity could be suitably quartered within the dormitories" (*id.* at 21a, 23a).[11]

[11] The court also remanded to the district court for it to determine whether, in light of changed conditions resulting from this litigation, the nature of confinement at the MCC is now sufficiently tolerable that the order limiting incarceration of all detainees at the MCC to a period of less than 60 days should be rescinded (App. A, *infra*, pp. 24a-25a).

Several other aspects of confinement at MCC were similarly held to constitute impermissible "restrictions and privations" that were not justified by compelling governmental interests. Specifically, the court of appeals held that there was no sufficient justification for the MCC policy prohibiting receipt of packages containing food and personal items by inmates (*id.* at 32a-33a). The court also determined that governmental security interests did not justify the MCC rules that prohibit detainees from observing searches of their rooms and that require detainees and convicted inmates to expose their body cavities during searches conducted after contact visits (*id.* at 29a-32a). Finally, the court rejected asserted security concerns and upheld the district court's order enjoining the random inspection of outgoing mail and the "publisher only" rule that limits the receipt of books and magazines by inmates at the MCC (*id.* at 26a-29a).[12]

The court of appeals reversed the ruling of the district court that inmates must be permitted to possess typewriters for their personal use in their rooms. The court of appeals stated that the district court had improperly rejected "the MCC's judgment that * * * particular problems of security, storage, and theft [would arise] from inmates' ownership of typewrit-

[12] Relying on the Sixth Amendment right to counsel and the due process right of prisoners to have access to the courts, the court of appeals also affirmed the orders of the district court requiring an expansion of the MCC library and of visiting hours for attorneys (App. A, *infra*, pp. 35a-36a).

ers * * *" (*id.* at 33a). The court of appeals also reversed the district court's determination that inmates should not be required to wear uniforms, holding (*id.* at 34a) that

> the MCC has demonstrated a legitimate security interest in readily identifying inmates that outweighs the inmates' understandable desire to control their own appearance.

REASONS FOR GRANTING THE WRIT

This case raises several important questions concerning the rights of pretrial detainees to challenge the conditions of their confinement. The court of appeals has articulated a requirement under the Due Process Clause that every restriction imposed on pretrial detainees during confinement must either be inherent in the concept of confinement or be supported by a "compelling necessity." This constitutional standard has been expressly rejected by the First Circuit in *Feeley* v. *Sampson*, 570 F.2d 364, 371, which requires instead that a restriction imposed during confinement be shown to have a "reasonable relationship" to valid governmental objectives. The District of Columbia Circuit, in *Campbell* v. *McGruder*, No. 75-1350, decided March 30, 1978, has elaborated still a third due process standard that is based on considerations different from those relied on by either the First Circuit or the court of appeals in this case. It is important that this conflict among the circuits be resolved, both because of the significant volume of

litigation concerning the rights of pretrial detainees that has occurred and will continue to arise in the absence of dispositive guidance by this Court, and also because of the substantial practical impact of the decision in this case on the administration of the federal Metropolitan Correctional Center.

Moreover, in its invalidation of several specific restrictions and practices of confinement at the MCC, the court of appeals has rejected the determination of corrections officials that these challenged practices serve the government's compelling interest in maintaining security and order within the facility. In holding these practices to be invalid, the court of appeals failed to comply with decisions of this Court requiring that deference be given to determinations made by correctional officials as to the needs of security and has created a conflict among the courts of appeals as to the validity of these specific institutional practices. In order to resolve this conflict among the courts of appeals, the petition for a writ of certiorari should be granted.[13]

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[13] The decision of the district court constituted, in our view, an excessive intrusion into the minutiae of administration of the MCC, which the rulings of the court of appeals did much to ameliorate. In general, however, we continue to disagree with virtually all of the determinations of the court of appeals that struck down particular practices of the Bureau of Prisons in administering the MCC. Nevertheless, in order to avoid unduly complicating this Court's task should it elect to grant review in this case, we have not presented for review every adverse ruling. For example, the additional library requirements upheld by the court of appeals are not considered likely to be of significant utility to inmates, on the basis of the Bureau of Prisons' experience stocking libraries at its many institutions around the country, and the Bureau believes that the money expended to meet this requirement could be better spent for inmate welfare in other ways. Moreover, we believe there has been an insufficient showing of need for injunctive relief with regard to attorney visiting hours. In both instances, however, the Bureau has concluded that the adverse impact of the decision is sufficiently localized and limited that review by this Court at the present time is not deemed necessary.

Similarly, we believe that the restriction against random inspection of outgoing mail is not reconcilable with this Court's decision in *Procunier* v. *Martinez*, 416 U.S. 396, 413-414. Nevertheless, the Bureau is independently considering termination of its present mail inspection practices, and we have accordingly determined not to present the issue of the legality of such practices to the Court in this petition.

The Attorney General has established a Federal Corrections Task Force in the Department of Justice. The Task Force is to present to the Attorney General recommendations for national corrections standards and a federal corrections policy regarding conditions of confinement for both sentenced prisoners and pretrial detainees. We will advise the Court in a supplemental filing if any pertinent policy determinations are made by the Attorney General as a result of the Task Force investigation.

1. Prior to 1970, none of the courts of appeals had confronted the question of the nature of the limitation imposed by the Due Process Clause on the conditions of confinement for pretrial detainees. Since that time, however, at least three different constitutional standards have been articulated by the various courts of appeals. The government has argued in this case that in reviewing practices of detention for pretrial detainees under the Due Process Clause, unless a practice abridges a specific, fundamental right guar-

anteed by other provisions of the Constitution, the practice should be upheld if it is reasonably related to the objective of confinement and the inherent needs of the institution for security, order and safety. Furthermore, in determining whether living conditions during confinement are decent and reasonable, consideration should be given to cost, administrative feasibility, and available practical alternatives.

The First Circuit, in *Feeley* v. *Sampson*, *supra*, has articulated a due process analysis that is consistent with the government's position in this case. In *Feeley*, the court held that the Due Process Clause requires the government to accomplish the custodial objectives of pretrial confinement "in a reasonable, and hence a humane, manner." 570 F.2d at 370. The court declined to require a "compelling necessity" or "strict scrutiny" evaluation of challenged institutional restraints that do not affect specific constitutional guarantees, such as the First Amendment. The court stated that an over-broad application of the standard of compelling necessity would fail to give appropriate weight to the several valid governmental objectives in pretrial confinement, and would result in an impermissible second-guessing of institutional determinations made by corrections officials. *Id.* at 371, citing *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 127-128. See also *Main Road* v. *Aytch*, 565 F.2d 54, 57 (C.A. 3); *Padgett* v. *Stein*, 406 F. Supp. 287, 295 (M.D. Pa.).[14]

[14] In situations not involving specific constitutional guarantees, the Seventh Circuit has applied a due process standard similar to that adopted by the First Circuit. See *Duran* v. *Elrod*, 542 F.2d 998, 999, 1001 (C.A. 7) (restrictions must be "reasonably" necessary to secure the governmental interest; various interests, including fiscal constraints, may be considered).

The District of Columbia Circuit has adopted a due process analysis that differs in its critical concepts from that adopted by the First Circuit, but levies essentially similar requirements. In *Campbell* v. *McGruder*, *supra*, the court emphasized that pretrial detainees have a retained liberty interest that "is rooted in the presumption of innocence" (slip op. 13),[15] and that a principal corollary of the presump-

[15] The Third Circuit has expressed substantial doubt as to the relevance of the "presumption of innocence" in establishing substantive restraints on government action under the Due Process Clause.

> We note that some courts have apparently relied upon the "presumption of innocence" in cases involving pretrial detainees. However, we do not believe that principle serves as the source for those substantive rights. Rather, the presumption allocates the burden of proof. It is a principle of evidence, 9 J. Wigmore, Evidence § 2511 (3d ed. 1940), acting as the foundation for the procedural due process requirement of proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *see also Leland* v. *Oregon*, 343 U.S. 790, 802-803, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) (Frankfurter, J., dissenting). If the "presumption of innocence" is read literally to apply to all pretrial procedures, it is impossible to justify bail or pretrial detention, both of which are restraints imposed upon an accused despite the presumption. * * *

Hampton v. *Holmesburg Prison Officials*, 546 F.2d 1077, 1080 n.1 (C.A. 3).

tion of innocence is the constitutional prohibition against the infliction of any punishment prior to conviction (*id.* at 13-14). The court stated that, in order to assure that the conditions of confinement do not accumulate to effect what amounts to improper punishment (*id.* at 17),

> each restriction of the jail regimen must be carefully examined to determine if it is justified by substantial necessities of jail administration. To evaluate these necessities we will look to the needs of the state to produce the detainee for trial, to maintain the security of the jail, or generally to sustain the institution of pretrial detention at a feasible cost.

The court stated that a compelling necessity would be required to justify any practice that is "likely to impair a detainee's mental or physical health" (*id.* at 18), or negatively affect the detainee's preparation or presentation of his defense at trial (*id.* at 18-19).

The Second Circuit has formulated a more exacting and less flexible due process standard, which proscribes all "restrictions and privations" inflicted on detainees that are not justified by the "compelling necessity" of detention or the "inherent" concept of confinement (App. A, *infra*, p. 12a). The court has stated that, in evaluating the conditions of confinement, "cries of fiscal necessity * * * [and] administrative convenience" cannot justify institutional privations or restraints (*ibid.*).[16]

The courts of appeals are thus in open disagreement as to the correct standard to be applied in reviewing challenges by pretrial detainees to conditions of confinement under the Due Process Clause. The conflict among the circuits cannot be resolved without the aid of this Court.

b. The due process standard adopted by the court of appeals in this case lacks substantial support in the decisions of this Court.[17] The premise underlying the Second Circuit's rule is that, since a pretrial de-

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[16] The Fourth Circuit has adopted a standard in these cases that parallels the Second Circuit test in that it severely limits the governmental objectives that may be considered in justification of any restraint on pretrial detainees. *Patterson* v. *Morrisette*, 564 F.2d 1109 (C.A. 4).

[17] The authority from which the Second Circuit has derived its broad "compelling necessity" test is tangential at best. In *Detainees of the Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (C.A. 2), the court found authority for its test in *Shapiro* v. *Thompson*, 394 U.S. 618 (right of interstate travel), *Tate* v. *Short*, 401 U.S. 395 (equal protection violated by additional imprisonment based on inability to pay a fine), and *Shelton* v. *Tucker*, 364 U.S. 479 (teacher's First Amendment rights infringed by a school board policy requiring disclosure of personal associations). These cases fall far short of providing direct support for the Second Circuit's rule.

The other principal authority relied on by the Second Circuit is a law school note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 Yale L.J. 941 (1970). The due process analysis of the Note focuses on cases involving statutory construction of civil commitment legislation, in which the courts inferred a legislative intent to authorize only the "least restrictive" confinement. *Id.* at 949.

tainee must be presumed to be innocent, he may not be deprived of the rights possessed by other citizens except to the extent that such deprivations are justified by compelling governmental necessities (App. A, *infra*, p. 12a; see *Rhem* v. *Malcolm*, 507 F.2d 333, 336 (C.A. 2)).

An initial defect in the analysis of the Second Circuit is that it has never been the law that the government must justify all "restrictions and privations" that it imposes on citizens by a "compelling necessity." Instead, it is the ordinary rule that

> the guaranty of due process * * * demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained.

Nebbia v. *New York*, 291 U.S. 502, 525; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379. Only where "fundamental" individual rights are infringed has the government been required to show that "compelling" necessities justify the challenged action. See *Griswold* v. *Connecticut*, 381 U.S. 479, 481-486 (citing cases).

The Second Circuit's rule of "compelling necessity" would be justified under the Due Process Clause only if *every* "restriction and privation" imposed on pretrial detainees implicates a fundamental interest protected by the Constitution. But this position would seem difficult to maintain. The initial decision to detain the inmate is itself, of course, a fundamental deprivation of liberty. But such detentions are implicitly authorized by the Constitution and are justified by the governmental interest in controlling crime; furthermore, the prisoner is afforded a hearing prior to commitment. See *Campbell* v. *McGruder*, *supra*, slip op. 10-11; *Feeley* v. *Sampson*, *supra*, 570 F.2d at 369 n. 4. With regard to the conditions of confinement once detention is ordered, it may be that some aspects of confinement implicate interests that the Court has recognized as "fundamental" (*i.e.*, First Amendment freedoms; see *Feeley* v. *Sampson*, *supra*, 570 F.2d at 369). Other "privations" of confinement, however, may more directly impinge only the inmates' understandable desire to live comfortably during detention (*i.e.*, receipt of food packages, typewriter in the cell). This Court has never elevated the individual's interest in economic comfort to the level of a fundamental constitutional interest. See *Dandridge* v. *Williams*, 397 U.S. 471, 484-487.[18] If a literal interpretation were given to the Second Circuit rule—that all "restrictions and privations" imposed during pretrial detention must be justified by a compelling governmental interest—the rule would seem to sweep too broadly.[19]

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[18] And, of course, an individual's free exercise of rights over his property has not been thought fundamental, but rather subject to reasonable restriction.

[19] Such a broad rule is especially inappropriate in this case because the fact of confinement itself imposes limitations on constitutional rights "which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125. See *Pell* v. *Procunier*, 417 U.S. 817, 822.

In the analogous context of the due process restraints applicable to civil commitment, the Court has stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U.S. 715, 738. See *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245, 249-250. This basic requirement of due process is equally applicable in the context of pretrial confinement. In *Procunier* v. *Martinez*, 416 U.S. 396, 404, the Court has emphasized the "Herculean obstacles to effective discharge" of the duties of prison administrators. In the context of pretrial confinement, no less than with convicted prisoners, these duties include maintaining internal order and discipline and securing the institution against unauthorized access or escape. See *ibid.* Considerations of institutional order and security are "peculiarly within the province and professional expertise of corrections officials, and * * * courts should ordinarily defer to their expert judgment in such matters." *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128, quoting *Pell* v. *Procunier*, 417 U.S. 817, 827. As the First Circuit has stated in *Feeley* v. *Sampson*, *supra*, 570 F.2d at 369-371 and n. 4, however, a requirement that every aspect of confinement be strictly reviewed to ensure that it directly accomplishes a compelling governmental objective is inherently inconsistent with a proper recognition of the legitimacy of the purpose of confinement and the

deference appropriately due to officials charged with the safe and efficient accomplishment of this difficult task.[20]

Accordingly, here, as in the context of civil commitment, the basic requirement of due process should be that the conditions and practices of confinement be reasonable in light of the valid government objectives in jail administration. *Ibid.*; *Campbell* v. *McGruder*, *supra*, slip op. 17. These objectives include "the needs of the state to produce the detainee for trial, to maintain the security of the jail, or generally to sustain the institution of pretrial detention at a feasible cost." *Ibid.* In each challenge to a condition of authorized pretrial confinement under the Due Process Clause, the government must show that the restrictions imposed are justified by these limited purposes and are accomplished in "a reasonable, and hence a humane, manner." *Feeley* v. *Sampson*, *supra*, 570 F.2d at 370, 371.[21]

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[20] The court of appeals recognized in this case that maintenance of security is a "compelling necessity" of confinement. As discussed at pp. 30-41, *infra*, however, the court of appeals failed to adhere to the requirement in *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, that deference be given to the determination of the needs of security by corrections officials.

[21] We acknowledge that application of this test to pretrial confinement may well require more favorable conditions of detention than are required for convicted prisoners. Restrictions on convicted prisoners may be reasonably related to any valid penological objective such as deterrence of future crime, protection of society, and rehabilitation of the offenders, as well as to institutional concerns for security, order, and admin-

The due process analysis of the court of appeals in this case, however, has too broadly required a "compelling" justification for all "restrictions and privations" of confinement. The court's decision has also too narrowly circumscribed the government interests that may justify, as reasonable, the practices and conditions of pretrial detention.

2. The difficulties inherent in the due process analysis of the court of appeals are illustrated in its evaluation of the practice of using bunk beds in the residential rooms at the MCC. The court of appeals reasoned that this practice is unconstitutional because "the administrators of the MCC have made no showing of compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling" (App. A, *infra*, p. 17a). We submit that the court has erred in this conclusion, both in its failure to recognize the legitimate governmental interests in administrative feasibility and fiscal economy, and in its evaluation of the extent to which legitimate personal expectations of privacy have been abridged.

The court stated that the use of a 75-square-foot room to provide sleeping quarters for two inmates affords the inmates "virtually no space for minimal privacy or in which to avoid the other's presence"

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istrative feasibility. *Pell* v. *Procunier*, *supra*, 417 U.S. at 822-823. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129-130. The legitimate objectives of confinement are far more limited for pretrial detainees. See *Duran* v. *Elrod*, 542 F.2d 998, 999-1000 (C.A. 7).

(*id.* at 18a). The court relied on testimony from a prior case involving rooms of only 40 square feet in which double-celling of inmates had been accompanied by fights, disagreements, charges of theft and frequent involuntary contact between the inmates (*ibid.*, as amended by Appendix C, *infra*, p. 41a, citing *Detainees of the Brooklyn House of Detention* v. *Malcolm*, *supra*.)[22] Application of the factual analysis of the prior case in the substantially different context of the MCC is highly questionable. At the MCC, detainees share nearly twice as much space in their residential rooms, are confined to their rooms for only 7-8 hours per day (or about half as long as in the *Detainees* case), during most or all of which they are presumably asleep, and their rooms open into modern and well-decorated multipurpose facilities instead of a long barren passageway as in *Detainees*. (Compare App. G, *infra*, p. 208a, with 520 F.2d at 395.) Furthermore, the expert testimony introduced by the government in this case concluded that double-bunking in the MCC residential rooms

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[22] The district court entered summary judgment on this issue after touring the facility, holding that the decision in *Detainees* was dispositive against the use of double-celling at the MCC (App. G, *infra*, pp. 207a-211a). The district court relied significantly on the fact "that the rooms were *designed* and built to hold a single person, not more" (*id.* at 205a), and that double-celling results in "unwanted intimacy" (*id.* at 206a). The court stated that it was not required to relitigate "general propositions about matters of human experience" and concluded that the decision in *Detainees* established that double-celling was inherently indecent (*id.* at 211a).

would have no "significant detrimental effects on the physical or psychological health of the inmates at that institution" (*id.* at 209a).[23]

Even assuming that the court could permissibly have concluded that a significant abridgment of the inmate's personal privacy results from the use of bunk beds in the residential rooms, there is no basis in the decisions of this Court for the further conclusion that interference with privacy in this context must be supported by a "compelling" justification. The cases in this Court that have defined a constitutional privacy interest have never suggested that this interest requires a physical separation of all persons, especially in the context of institutional care or confinement.[24] Indeed, in *Lanza* v. *New York*, 370 U.S. 139, 143, the Court indicated that an individual's generalized interest in privacy lacks substantial weight during institutional confinement in a jail facility. The government's concerns for administrative convenience and fiscal necessity should therefore properly be considered in determining whether institutional abridgment of this aspect of personal privacy is justified as reasonable and humane government

[23] This distinguishes this case from *Campbell* v. *McGruder*, *supra*, slip op. 29, in which the District of Columbia Circuit upheld a decision banning double-bunking in 48-square-foot cells on the basis of a finding that the conditions were "likely to impair the mental and physical health of the detainees."

[24] The privacy cases have focused on the individual's control over his or her procreative choices. *Roe* v. *Wade*, 410 U.S. 113, 147-164; *Griswold* v. *Connecticut*, 381 U.S. 479.

action. See *Campbell* v. *McGruder*, *supra*, slip op. 17: *Feeley* v. *Sampson*, *supra*, 570 F.2d at 370, 371.[25]

The court of appeals expressly refused to consider the administrative and fiscal interests of the government in its evaluation of the permissibility of double-celling at the MCC (App. A, *infra*, p. 19a). The court disregarded efforts made by the Bureau of Prisons to stem the unprecedented flow of inmates into the facility (pp. 6-7, *supra*) and the need to retain inmates at the MCC for the convenience of their trials in nearby courts. The court also gave no consideration to the fiscal constraints within which the Bureau operates or to the costs that would be required in altering operating procedures or in using or constructing additional facilities.

We do not mean to suggest that jail administrators should be allowed to justify any condition of confinement merely by claiming some connection, however tangential, with the needs of jail management. In determining whether the conditions are justified by

[25] In the absence of a restriction on a basic constitutional right, the government's interest in allocating finite public resources is a legitimate factor to be considered even when basic personal or economic needs of individuals are at stake. *Dandridge* v. *Williams*, 397 U.S. 471, 479-480. If no consideration is given to fiscal restraints in pretrial confinement, it is difficult to perceive any limit to the court of appeals' application of its "privacy" concept: a *per se* ban on the use of any room to hold more than one inmate would seem to result. Even the court of appeals, however, has not extended its reasoning to dormitory rooms, having instead indicated that they may be used to house 60 or more inmates (App. A, *infra*, pp. 21a-23a).

considerations of cost and feasibility, the existence of more suitable alternatives would bear on the reasonableness of the decision of jail authorities. See *Feeley* v. *Sampson*, *supra*, 570 F.2d at 374. Moreover, the level of care provided may not fall below a minimum threshold of decency and humane treatment. *Id.* at 370. The court of appeals did not rely upon any evidence that, in the specific context of the facilities provided at the MCC, the practice of double-bunking in residential rooms fails to provide minimally decent housing. The court's reliance upon the detainees' interest in privacy, and upon evidence of indecent conditions in a prior case involving substantially smaller quarters and a different institutional environment, does not support any such finding in this case. Rather than impose, in effect, a rule that double celling is *per se* unconstitutional, the court of appeals should have vacated the entry of summary judgment and remanded for an evidentiary hearing as to the justification for the practice in the particular context of the MCC.

3. The court of appeals recognized that maintenance of security and order is a compelling or inherent necessity of jail administration, and it stated that an "institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded" (App. A, *infra*, pp. 12a-13a). In applying this standard to several specific institutional security practices claimed to abridge the constitutional rights of inmates at the MCC, however,

the court of appeals rejected the determination of correctional officials that the challenged practices serve the facility's substantial interest in security and order. The court held that these security practices were unjustified interferences with the retained constitutional rights of both detainees and convicted inmates,[26] and it enjoined further application of the rules at the MCC.

The court's holdings represent an impermissible intrusion into the affairs of jail administration, in disregard of this Court's decision in *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, *Pell* v. *Procunier*, 417 U.S. 817, and *Procunier* v. *Martinez*, 416 U.S. 396. We do not dispute that convicted prisoners and pretrial detainees alike retain constitutional rights that are consistent with the nature of their confinement, and that courts must guard against unwarranted interference with these retained interests. *Procunier* v. *Martinez*, *supra*, 416 U.S. at 405. Nonetheless, there are certain "limitations on constitutional rights * * * which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Labor*

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[26] The district court and the court of appeals did not differentiate between the constitutional claims of pretrial detainees and convicted inmates in enjoining these security practices. It has been stated that when institutional security is the justification for a given restriction, even though fundamental constitutional rights may be implicated, there is no reason for distinguishing pretrial detainees from prisoners. *Main Road* v. *Aytch*, 565 F.2d 54, 57 (C.A. 3); *United States* v. *Hearst*, 563 F.2d 1331, 1345-1346 n. 11 (C.A. 9); *Taylor* v. *Sterrett*, 532 F.2d 462, 470 n. 11 (C.A. 5).

Union, *supra*, 433 U.S. at 125. For example, both First and Fourth Amendment rights are necessarily restricted during imprisonment and must be evaluated "in light of the special characteristics of the * * * environment." *Procunier* v. *Martinez*, *supra*, 416 U.S. at 410, quoting *Tinker* v. *Des Moines School District*, 393 U.S. 503, 506. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129; *Pell* v. *Procunier*, *supra*, 417 U.S. at 822; see also *Lanza* v. *New York*, 370 U.S. 139, 143.

This Court has held that the concern to protect rights specifically guaranteed by the Constitution does not change the basic standard by which courts are to review challenged restrictions in a prison context: if the regulation or practice is reasonably related to the objective of maintaining jail security and order, it should be upheld. *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 129-130. Furthermore, the burden should not be placed on prison authorities to show affirmatively that the absence of a particular restriction would be detrimental to the maintenance of security or order. *Id.* at 128. Instead, courts should ordinarily defer to the expert judgment of prison administrators and limit judicial inquiry to those occasions when "substantial evidence" indicates "that the officials have exaggerated their response" to the concerns of prison management. *Ibid.*; *Pell* v. *Procunier*, *supra*, 417 U.S. at 827.

In this case, the courts below failed to give proper recognition to these principles. Before turning to our discussion of the particular rulings of the court of appeals that we are challenging on these grounds, however, we wish to emphasize that we are not contending that the practices in issue are necessarily compelled in order to maintain minimum levels of security or that they may not prove subject to modification or amelioration in various particulars, as prison authorities deem prudent. The Bureau regularly reevaluates the need for various restrictive regulations; indeed, such a reevaluation is presently being undertaken by the Justice Department's correctional task force (see note 13, *supra*). The issue here does not concern the details of these policies but the proper boundary between the duty of the courts to enforce constitutional obligations and the province of correctional authorities to evolve sensible policies that do not overstep constitutional limits.

a. The courts below held that the MCC must allow inmates to receive packages containing items of personal property (App. A, *infra*, pp. 32a-33a). Government corrections officials testified in the district court that the rule prohibiting inmates from receiving packages of personal property was necessary to avoid fighting, stealing and extortion among inmates, and also to limit the introduction of items of contraband into the facility. These officials testified to the serious opportunities that packages provide for the undetected concealment of contraband items (A. 1242, 1550-1551, 1686).[27] The district court dismissed these security

[27] For example, contraband may be sewn into the linings of garments or concealed in food packages.

concerns as "dire predictions" (App. F, *infra*, p. 162a) and held the restriction against receipt of packages to be invalid as arbitrary and capricious (*id.* at 163a-164a). The court of appeals affirmed the findings of the district court, adding only that more permissive rules exist at other facilities and that there is "no indication that this greater liberality has resulted in unmanageable difficulties" (App. A, *infra*, pp. 32a-33a).

Neither of the courts below identified the constitutional nature of the inmates' asserted right to receive packages containing items of personal property while in custody.[28] Assuming that such a right may exist, there is no justification in the record for the courts' conclusion that it is arbitrary and capricious to deny inmates that right at the MCC.

Corrections officials testified to the important security concerns justifying the restriction on receipt of packages at the MCC. The courts below failed to give appropriate deference to this testimony. Despite the courts' disagreement with the security concerns of the expert witnesses, there was no "substantial evidence" in the record indicating that this testimony was disingenuous or exaggerated. See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128. In this situation the regulation should have been upheld: "It is enough to say that [the correc-

[28] There is no suggestion in either of the opinions below that restricted use of property in this context implicates any fundamental interest in free speech or expression.

tions officials] have not been conclusively shown to be wrong." *Id.* at 132. The court of appeals should have applied here the same analysis it applied in a subsequent portion of its opinion in concluding that

> the MCC's judgment that the particular problems of security, storage, and theft arising from inmates' ownership of typewriters must override the desire of some to possess them. [App. A, *infra*, p. 33a.]

The same principle of deference to correctional judgment applies whether typewriters or other items of personal property are involved.[29]

b. The courts below enjoined enforcement at the MCC of the Bureau of Prisons' "publisher only" rule. This rule, which applies to all Bureau facilities, permits inmates to receive books and magazines only if the materials have been mailed directly from publishers. Federal corrections experts testified in this case to the substantial risk to security and order that

[29] The court's suggestion that other institutions allow receipt of packages without any "indication" of "unmanageable difficulties" does not constitute adequate evidence that the Bureau's concerns for security are improper. See *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 132. The absence of testimony concerning difficulties encountered at other institutions is not "substantial evidence," or indeed "evidence" at all, in the record of this proceeding. Moreover, the statement of the court of appeals purports to establish, at most, that difficulties encountered at other facilities are not "unmanageable." But the Bureau may legitimately seek to avoid "manageable" as well as "unmanageable difficulties." The unrebutted testimony in this case was that the security problems would be significant if packages were allowed at the MCC.

they believe results when such materials are mailed to inmates from outside the facility. Books and magazines are especially serviceable as a means for smuggling drugs or money into the jail; detection of items secreted in these materials is difficult, and a sufficient inspection can often result in partial or total destruction of the materials (A. 90-92). The "publisher only" rule is designed to avoid this substantial problem of hidden contraband while still accommodating the inmates' legitimate desire for access to reading materials. The court of appeals, however, rejected the Bureau's security concerns and invalidated the rule. The court held that the rule "significantly intrude[s]" upon the inmates' First Amendment rights (App. A, *infra*, p. 26a) and concluded that the MCC could "adequately protect its legitimate interests merely by inspecting books and magazines for contraband" (App. A, *infra*, p. 26a).

The court erred in its conclusion that the "publisher only" rule meaningfully interferes with a substantial First Amendment interest. The rule allows books and magazines to be received if mailed from any publisher (and now from bookstores as well). There is no suggestion in the record that this alternative means of obtaining reading materials is insufficient. See *Pell* v. *Procunier*, *supra*, 417 U.S. at 827-828. To the limited extent that the rule may increase the cost of obtaining published materials, this Court has held that where "other avenues" remain available for the receipt of materials by inmates, the

loss of "cost advantages does not fundamentally *implicate free speech* values." *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 130-131 (emphasis in original).[30] Accordingly, in light of the alternative channels that remain open for the receipt of materials by inmates and the fact that the rule "operates in a neutral fashion, without regard to the content of the expression," the "publisher only" rule does not substantially affect the freedom of expression retained by inmates at the facility. See *Pell* v. *Procunier*, *supra*, 417 U.S. at 828.

Moreover, the court of appeals misplaced the burden of proof in rejecting the Bureau's security concerns. The Bureau established its substantial need for strict supervision of these materials and the unmanageability of item-by-item inspection. There was no "substantial evidence" in the record suggesting that these concerns were not genuine, or that the administrative limitation applies too broadly.[31] *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128. Rather, the only evidence introduced

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[30] Furthermore, the MCC has a "relatively large" library for use by inmates, which mitigates to some extent any possible harshness of the rule (App. A, *infra*, pp. 26a-27a; App. G, *infra*, p. 216a).

[31] The district court asserted that the security concerns applied only to hard cover books, and that application of the "publisher only" rule to soft-back books was therefore overbroad (App. G, *infra*, p. 215a). The court's conclusion is inconsistent with the evidence that contraband may be secured between the pages of such books, making administrative detection unmanageable (A. 90-92).

indicates the reasonableness of the rule as a moderate and limited response to a significant security concern. The Tenth Circuit has upheld the Bureau's "publisher only" rule in *Woods* v. *Daggett*, 541 F.2d 237 (C.A. 10).[32] The decision of the court of appeals in this case has thus created a conflict among the circuits as to the validity of the Bureau's nationwide "publisher only" rule.

c. Inmates at Bureau of Prisons facilities, including the MCC, are required to expose their body cavities for visual inspection as part of the strip search conducted after contact visits with persons from outside the facility. This requirement has been upheld by several courts as a reasonable means of safeguarding correctional facilities against the introduction of weapons and contraband following contact visits. *E.g.*, *Daugherty* v. *Harris*, 476 F.2d 292 (C.A. 10), certiorari denied, 414 U.S. 872; *Bell* v. *Manson*, 427 F. Supp. 450 (D. Conn.); *Hodges* v. *Klein*, 412 F. Supp. 896 (D. N.J.); *Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836 (S.D.N.Y.); *Bijeol* v. *Benson*, 404 F. Supp. 595 (S.D. Ind.); *Penn El* v. *Riddle*, 399 F. Supp. 1059 (E.D. Va.). The need for such precautionary measures is justified by the fact that contact

[32] The Second Circuit distinguished *Woods* on the grounds that the case concerned a maximum security facility (App. A, *infra*, pp. 26a-27a n. 10). The court stated that inmates at the MCC pose a far smaller security risk (*ibid.*). There is nothing in the record to support this conclusion. Indeed, the testimony of Bureau of Prisons officials established that the risk of contraband smuggling at the MCC would be substantial without the "publisher only" rule (A. 90-92).

visits "present a unique opportunity for passing contraband, including weapons and drugs, into the Jail." *Feeley* v. *Sampson*, *supra*, 570 F.2d at 373.

The court of appeals held in this case, however, that unless there is probable cause to believe that the inmate is secreting contraband, this relatively intrusive form of inspection violates the Fourth Amendment. The court recognized that persons in custody relinquish some part of their protection against intrusive searches to protect the security of custodial facilities (App. A, *infra*, p. 29a). See, *e.g.*, *Lanza* v. *New York*, *supra*, 370 U.S. at 143.[33] The court ruled, however, that since the MCC "proved only one instance in the several years of its existence when contraband was found during a body cavity inspection," the procedure is of "little actual utility" at the MCC and is therefore unjustified (App. A, *infra*, p. 30a).[34]

This holding by the court of appeals disregards substantial evidence documented in this record (A. 1442, 1447-1450), and elsewhere (see *United States*

[33] In *Hoitt* v. *Vitek*, 361 F. Supp. 1238, 1254-1255 (D.N.H.), the court relied on *Lanza* for the proposition that inmates have no reasonable expectation of privacy in their cell rooms. Other courts have held that inmates retain some minimal right to privacy under the Fourth Amendment, but that this retained right is subject to reasonable searches undertaken in furtherance of the institution's interest in security. *E.g.*, *Bonner* v. *Coughlin*, 517 F.2d 1311, 1316-1317 (C.A. 7); *United States* v. *Savage*, 482 F.2d 1371, 1372-1373 (C.A. 9), certiorari denied, 415 U.S. 932.

[34] This observation wholly ignores the substantial deterrent effect that such searches inevitably have on efforts to pass contraband to inmates during contact visits.

v. *Park*, 521 F.2d 1381, 1382 (C.A. 9)), that body cavity inspections following contact visits discover and deter attempts to secrete drugs and weapons into an institution. The court of appeals erred in substituting its judgment for that of the corrections officials as to the "actual utility" of this security procedure. See *Pell* v. *Procunier*, *supra*, 417 U.S. at 827. The Bureau informs us that the problem of safeguarding its facilities from the introduction of contraband during contact visits is a significant correctional security concern and that it is reluctant to abolish or restrict the relatively liberal policies it now pursues in allowing contact visits (which many state correctional systems prohibit or severely limit). Accordingly, we request resolution by this Court of the conflict among the circuits created by the decision below with respect to this issue.

d. Finally, in a portion of its decision applying to pretrial detainees only, the court of appeals held that detainees must be allowed to observe routine inspections of their quarters. Substantial testimony was introduced before the district court to demonstrate that permitting detainees to observe room inspections leads to unnecessary friction and attempts by inmates to move concealed contraband (A. 1240-1241, 1545-1546, 1610, 1717-1718). The district court held, however, that these concerns were not "compelling" and were outweighed by the detainees' retained privacy interests (App. F, *infra*, p. 156a). The court of appeals affirmed, stating that "[w]e see no reason

whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege * * *" (App. A, *infra*, p. 31a).

There is no authority for the proposition that persons—either inside or outside of jail—have a privacy interest that requires that lawful searches of their premises be conducted in their presence. The fact that the searches conducted in this case are performed in a jail, where continual surveillance of quarters has always been recognized as a necessary condition of confinement, certainly does not enhance the individual's claim to privacy under the Fourth Amendment. See *Lanza* v. *United States*, *supra*, 370 U.S. at 143; *Smith* v. *Shimp*, 562 F.2d 423, 426 n. 2 (C.A. 7). Furthermore, the court's conclusion that there is "no reason whatsoever" to refuse to allow detainees to observe routine room inspection is inconsistent with the evidence of record in this case (*e.g.*, A. 1240-1241, 1545-1546, 1610, 1717-1718). Here, as in the several contexts discussed above, the court of appeals has failed to give appropriate weight to the unrebutted security justification established in the testimony of corrections officials.

> The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this.

Jones v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 128.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1978.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 618, 623—September Term, 1977

(Argued January 6, 1978 Decided January 24, 1978)

Docket Nos. 77-2035, 77-2135

LOUIS WOLFISH, et al., PETITIONERS-APPELLEES

v.

HONORABLE EDWARD LEVI, et al.,
RESPONDENTS-APPELLANTS

Before:

KAUFMAN, *Chief Judge*,
TIMBERS and MESKILL, *Circuit Judges*.

KAUFMAN, *Chief Judge*:

When the history of our criminal justice system is chronicled, no doubt one of its most sobering pages will describe the sad state of this nation's prisons and jails. Whether it be in filthy, narrow cells of an Alabama penitentiary or in overcrowded dormitories in a Bronx house of detention, we have quartered

individuals, both convicted or merely accused of crimes, major and minor, under conditions that shock the conscience of civilized men. To redress these glaring deficiencies, courts have often been summoned to insure that, at the least, minimum standards of human decency are met. And, when inhuman or barbaric conditions, or in the case of pretrial detainees, substantial deprivations not compelled by administrative necessity, are discovered, judges should not hesitate to enter the breach.

But, courts are singularly ill-suited to administer the minutiae of the daily affairs of prisons. Accordingly, although district courts are empowered with broad discretion to frame equitable remedies so long as the relief granted is commensurate with the scope of the constitutional infraction, a trial judge must tread carefully in less substantial matters best left to the expertise of prison officials.

This sprawling appeal, raising a score of issues concerning conditions and practices of New York's Metropolitan Correctional Center ("MCC"), presents this dilemma in sharp relief. In his decree, Judge Frankel intervened broadly into almost every facet of the institution. In most instances, the able district court judge's incursion on administrative authority was well-founded, and cured serious constitutional deficiencies in the operation of the MCC. But in other cases we believe a balance more restrained should have been struck between the court's power to redress inmate grievances and deference to prison administrators. Many of the cited deficiencies, if in-

deed they existed, were not of a kind to require a chancellor's decree to bring about compliance.

Of course, the problems presented by such an overexpansive decree does not fall on the trial judge's shoulders alone. In too many cases, the parties' impulse is to run to the courts as a first resort, no matter how minor or trivial the problem. The fault in this respect lies too often with unresponsive or uncooperative government officials. And as then Chief Judge Friendly aptly stated in *Negron* v. *Wallace*,[1] "there is . . . a responsibility, resting upon all counsel but especially upon those for civil rights organizations, not to swell the tidal wave of actions under the civil rights statute by bringing suits for . . . relief when no need for this exists." [2] After wading through the many aspects of this decree, we can only implore the litigants in this case to avoid this increasingly acute problem of "litigation neurosis" [3] in future dis-

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[1] 436 F.2d 1139 (2d Cir. 1971).

[2] *Id.* at 1141.

[3] See Kaufman, 39 Brooklyn L. Rev. xiii, xiv-xv (1973). The famous satirical writer Russell Baker commented in a recent *New York Times* article that immediate resort to the courts to solve every problem, no matter how insignificant, has become "a new national habit." But, using as an illustration a lawsuit by women students against Yale University, he cogently observes, "[t]he courthouse solution is not only expensive, troublesome to the [student] and time consuming, but also debilitating to her self-esteem, for it reminds her that to cope with the problem which her mother could solve in an afternoon, she requires the aid of lawyers, a judge, a jury, witnesses, transcripts, three years of litigation and two appeals courts." Baker, "The Courts of First Resort," *N.Y. Times*, July 26, 1977, at 29, col. 1.

putes by resolving petty problems in the administrative arena, without burdening our courts.

I.

In August 1975, when the Metropolitan Correctional Center replaced the converted waterfront garage on West Street that had served as New York City's federal jail for over 45 years, it represented the architectural embodiment of the best and most progressive penological planning. Abjuring the cage motif of traditional cellblock jail construction, the architects of the MCC, the New York firm of Gruzen and Partners, well-known for its innovative work in correctional design, created a series of self-contained "modular units". Each unit consisted of approximately 24 private rooms, or six dormitory rooms, adjacent to a multi-purpose room, a balcony education area and a recreation room to which inmates were to, and in fact do, have access for 16 to 19 hours a day.

In the view of Paul Silver, Gruzen's principal architect on the MCC project, as well as the numerous other correctional experts who assisted in the jail's development,[4] the modular unit concept was a sensible alternative to the "illusory freedom" of the standard jail. By substantially eliminating the need

[4] Among those experts were several witnesses in this case, including: Norman Carlson, Director of the Bureau of Prisons; Gary Mote, Assistant Director of Planning and Development for the Bureau; Dr. Walker W. Menninger; and, William G. Nagel.

for inmate movement to major facilities within the institution, the corresponding necessity of locking inmates in their cells while the staff directed traffic was reduced and face-to-face contact between inmates and their keepers increased. The modular unit, in short, was expected to humanize staff-inmate relations and provide a more "homelike" atmosphere, affording inmates greater privacy and freedom than jails of earlier construction.

The modular unit concept was fully implemented in the design of MCC. Each of the ten residential units is furnished with recreational and exercise equipment, telephones, color televisions, books, food preparation and dining facilities, and a visiting room. The residential atmosphere is enhanced by carpeting and the exterior walls are studded with clear plastic windows. There are no central dining, recreational, religious, assembly or work facilities with the exception of an outdoor recreation area on the roof.

When this action was commenced, the law library, general library and commissary were all essentially storerooms from which books and other items could be ordered. In fact, most inmates, except a selected cadre of sentenced inmates, may leave their unit only for one hour of daily recreation on the roof, if the weather permits, and for sick calls, and court appearances.

But, Samuel Johnson's comment, "Hell is paved with good intentions," [5] is particularly appropriate

[5] Boswell, *Life of Johnson*, April 14, 1775.

here. While the MCC in operation can by no means be characterized as an earthly Hades, it nevertheless has fallen far short of its planners' expectations. Their major miscalculation has proven to be a failure to foresee the influx of more inmates than contemplated. Although originally designed to accommodate a population 50 percent larger than the 300 inmate capacity of the West Street jail, an unprecedented rise in pretrial and sentenced commitments commencing in 1975 quickly forced the MCC to house numbers significantly in excess of its rated capacity. To satisfy these demands, the MCC's administrators have pressed into service every square foot of space which conceivably could be used as sleeping space. The deleterious effects of this overcrowding will be described in greater detail. Suffice to say that overcrowding has destroyed any modicum of privacy for many pretrial detainees. They find themselves double-bunked in rooms designed for and, according to Silver, capable of holding only one. We find even more disturbing however, the fact that when no rooms are available, as is customarily the case, new arrivals are forced to sleep on sofas or cots in the common areas under the glare of constantly burning lights. And sentenced inmates have been crammed 20 at a time into dormitories intended to house only ten. Moreover, the stresses of serious excess population have burdened beyond capacity equipment and other facilities designed for far fewer people.

II.

The consequences of this excessive crowding, strained by frustrations over the physical curbs resulting from modular confinement and the restrictions and degradation that are common generally to prisoners, led to the institution of this suit. Indeed, this lawsuit mirrors the difficulties present at the MCC almost from its inception, for it was commenced barely four months after the institution opened. On November 28, 1975, inmate Louis Wolfish, proceeding *pro se*, sought a writ of habeas corpus because of allegedly unconstitutional conditions at the facility. A week later, on December 2, 1975, the action was declared a class action on behalf of all persons confined at the facility, including pretrial detainees and sentenced prisoners,[6] and the Legal Aid Society was assigned as counsel. On January 11, 1976, the Society filed an amended petition, charging that inmates had been deprived of their constitutional and statutory rights because of, *inter alia*, overcrowded conditions, lengthy confinements, unnecessary restrictions on movement, inadequate visiting hours, and lack of sufficient employment, recreational

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[6] In addition to pretrial detainees—that is unconvicted individuals awaiting trial, held at the MCC because they could not post bail—the MCC holds sentenced prisoners awaiting assignment to another prison facility or who have been designated to serve their terms at the MCC, sentenced prisoners transferred to the MCC on writs to testify or stand trial, witnesses in protective custody, and persons incarcerated for contempt of court.

and educational opportunities. This litany of woes touched on almost all aspects of the institution's conditions and practices.[7]

In the year following the filing of the amended petition, Judge Frankel intervened twice to correct alleged maladministration of the facility. On January 28, 1976, after notices at the MCC heralded a severe curtailment of visiting hours, he issued a preliminary injunction to maintain the status quo pending the outcome of the litigation. And on October 1, 1976, after the New York Telephone Company threatened to remove the MCC's telephones because of a multitude of fraudulently placed calls, a second preliminary injunction was issued ordering the facility to maintain and improve its system of local and long distance telephone services.

III.

Upon appellees' motion, and appellants' cross-motion for partial summary judgment, a variety of other issues were decided on January 5, 1977. Relying on affidavits "recounting undisputed facts" and upon his own observations in touring the facility, Judge Frankel enjoined the use of single occupancy rooms for two inmates ("double-celling"), confiscation of property without supplying receipts, reading of outgoing mail, and enforcement of a "publisher only" rule that limits inmates to the receipt of reading materials directly from a publisher or book club. On the other hand, Judge Frankel upheld the appellants' practice of opening mail in the presence of the recipient for the exclusive purpose of discovering contraband. Rulings on other complaints, including a severe limitation on the receipt of packages, were deferred. *See United States ex rel. Wolfish* v. *Levi*, 428 F. Supp. 333 (S.D.N.Y. 1977). Appellants filed a notice of appeal from this order on March 18, 1977.

[7] As an indication of the scope of this action, the amended petition also decried the inadequate phone service; "strip" searches; room searches outside the inmate's presence; a prohibition against the receipt of packages or the use of personal typewriters; interference with, and monitoring of, personal mail; inadequate and arbitrary disciplinary and grievance procedures; inadequate classification of prisoners; improper treatment of non-English speaking inmates; unsanitary conditions; poor ventilation; inadequate and unsanitary food; the denial of furloughs; unannounced transfers; improper restrictions on religious freedom; and an insufficient and inadequately trained staff.

IV.

Finally, trial of the many remaining issues began on February 28, 1977 and continued until the end of the following month. At trial, appellees called 21 witnesses, relying primarily on the testimony of MCC inmates and four correctional experts; appellants, in turn, summoned 23 witnesses to the stand, including MCC personnel and a battery of seven correctional experts.[8] In addition to hearing this

[8] Of the 21 witnesses called by the appellees, ten were inmates or former inmates of the MCC who had been incarcerated in virtually every area of the prison for appreciable lengths of time. In addition, appellees presented the testimony of the following correctional experts: Dr. Frank N. Rundle,

testimony and receiving numerous exhibits into evidence, Judge Frankel in his customary conscientious manner, twice toured the MCC during trial.

On September 15, 1977, the judge decided all the remaining issues except those related to the adequacy of medical care.[9] He granted relief on the issues concerned with classification and movement between modules, overcrowding, law library facilities, the commissary, receipt of packages, use of personal typewriters, social and attorney visitation, telephone service, inmate presence during room searches, "strip" searches, uniforms, the availability of exercise for those inmates held in administrative detention, special diets for Muslim inmates, inspection of "incoming mail", and women's "lock-in". Other claims, touching on food, staff, and transfers, were

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supervising psychiatrist with the Lower East Side Service Center in New York City; William G. Nagel, Director of the Institute of Corrections of the American Foundation; Dr. David Fogel; and, Henry Alter.

Of the 23 witnesses called by the appellants, 14 were employees of the MCC. They also utilized seven expert witnesses, four of whom were employees of the Federal Bureau of Prisons. These experts included Gary Mote, Associate Director of Planning and Development for the Bureau; Norman Carlson, Director of the Bureau, and Dr. William Walter Menninger. The roster of expert witnesses on both sides of this litigation is familiar to all who have followed the history of cases in this Circuit involving the conditions of pretrial detention.

[9] The medical issues are presently being tried before the Hon. Sol Schrieber, U.S. Magistrate, who is sitting as a special master pursuant to Judge Frankel's order dated August 30, 1977.

dismissed. *See United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114 (S.D.N.Y. 1977). On October 21, 1977, appellants filed a notice of appeal from this judgment.[10]

V.

Constitutional Standards

1. *Pretrial detainees*

Fundamental to the Anglo-American jurisprudence of criminal law is the premise that an individual is to be treated as innocent until proven guilty by a jury of his or her peers. We have demonstrated our belief in this basic principle by according to pretrial detainees the rights afforded unincarcerated individuals, including, *inter alia*, rights to free speech, *Wilkinson* v. *Skinner*, 462 F.2d 570 (2d Cir. 1972), and freedom of religion, *Kahane* v. *Carlson*, 527 F.2d 492 (2d Cir. 1975). Accordingly, it is not enough that the conditions of incarceration for individuals awaiting trial merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause of the eighth amendment. Time and again, we have stated without equivocation the indisputable rudiments of due process: pre-

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[10] Subsequently, on November 15, 1977, we granted the appellants' request for a stay of portions of the judgment. At the same time, because of the importance of the issues raised by the case, we expedited the hearing of this appeal, and consolidated the appeal from the previous summary judgment order with the appeal from the final judgment of October 13, 1977.

trial detainees may be subjected to only those "restrictions and privations" which "inhere in their confinement itself or which are justified by compelling necessities of jail administration." *Rhem* v. *Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974) ("*Rhem I*"); *Rhem* v. *Malcolm*, 527 F.2d 1041 (2d Cir. 1975) ("*Rhem II*"); *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm*, 520 F.2d 392 (2d Cir. 1975) ("*Detainees*"). This standard of compelling necessity is neither rhetoric nor dicta. And we have made it clear that deprivation of the rights of detainees cannot be justified by the cries of fiscal necessity, *Todaro* v. *Ward*, —— F.2d ——, Slip Op. at 156, n.8 (2d Cir. October 31, 1977), administrative convenience, *Estelle* v. *Williams*, 425 U.S. 501, 505 (1976), or by the cold comfort that conditions in other jails are worse, *Rhem I*, 507 F.2d at 338. *See generally* Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 Yale L.J. 941 (1970).

But, we cannot ignore the Supreme Court's admonition in *Procunier* v. *Martinez*, 416 U.S. 396, at 405 (1974):

> . . . . courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

See also Newman v. *State of Alabama*, 559 F.2d 283, 286-87 (5th Cir. 1977).

Accordingly, once it has been determined that the mere fact of confinement of the detainee justifies the restrictions, the institution must be permitted to use

reasonable means to insure that its legitimate interests in security are safeguarded. We may disagree with the choice of means, but it is not wise for us to second-guess the expert administrators on matters on which they are better informed. *See Jones* v. *N.C. Prisoners' Labor Union*, —— U.S. ——, 97 S. Ct. 2532 (1977). Concern with minutiae of prison administration can only distract the court from detached consideration of the one overriding question presented to it: does the practice or condition violate the Constitution?

2. *Sentenced Inmates*

The parameters of judicial intervention into the conditions of incarceration for sentenced prisoners are more restrictive than in the case of pretrial detainees. An institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety. The Constitution does not require that sentenced prisoners be provided with every amenity which one might find desirable. *Newman* v. *State of Alabama*, *supra*, 559 F.2d at 291.

VI.

Statutory Jurisdiction

Although the judgment in this case is in substantial part grounded on uncontrovertible constitutional principles, it seems to wander on occasions into administrative matters that can only be described as

trivia. It appears the trial court justified a number of these intrusions solely on its assertion of a federal judge's statutory jurisdiction to oversee the operation of federal jails and prisons and not on any constitutional infringements.

While it is true that the Administrative Procedure Act permits a federal court to set aside federal agency action found to be "arbitrary" or "capricious", in violation of a statute, or of the Constitution,[11] there is substantial disagreement whether the Act applies to federal prisons. *Compare Clardy* v. *Levi*, 545 F.2d 1241 (9th Cir. 1976) *with Ramer* v. *Saxbe*, 552 F.2d 695 (D.C. Cir. 1975). We find it unnecessary to decide whether the Act would apply if the breach of a specific statutory mandate by federal prison officials were established, however, for the Act specifically exempts entirely from judicial review "agency action [which is] committed to agency discretion by law."[12] *See Greater New York Hospital Ass'n* v. *Mathews*, 536 F.2d 494 (2d Cir. 1976). The enabling statutes relied upon by appellees vest this broad unreviewable discretion in the Attorney General, merely requiring him to provide "suitable" quarters, safekeeping, care and subsistence for all inmates in his custody.[13] Accordingly, we cannot find any basis for

[11] *See* 5 U.S.C. § 706 (1976).

[12] *See* 5 U.S.C. § 701(a)(2) (1976).

[13] *See* 18 U.S.C. § 4042 (1970). *See also* 18 U.S.C. § 4081 (1970).

the invocation of statutory jurisdiction in this case.[14]

The wisdom of the Act's exemption of matters committed to agency discretion is only too vividly illustrated by the judgment in this case, for, unfortunately, the price of reaching to cure petty inconveniences, although motivated by the most humane instincts, is to fail to reserve the judge's awesome power and authority for matters of substance, not to be diminished by triflings. A striking example is the section of the decree abolishing the MCC's policy requiring visitors to request the key to the visiting room bathroom from a correctional officer. Although we understand that the order emanates from the court's understandably frustrating attempt to cope with the MCC's policy on social visits, which at one time forced visitors to return to the lobby and endure a lengthy reprocessing procedure whenever they wished to use restroom facilities, such a direction, prohibiting a practice commonly employed by service stations, or corridor restrooms of major corporations, could be better dealt with by methods other than inclusion in a judgment of a federal district court.[15]

It would have been advisable also for the trial court not to become embroiled in the emotion-laden contro-

[14] In contrast, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), relied on by appellees, involved the violation by the Secretary of Transportation of a specific statutory mandate requiring him not to approve construction of a road through a park unless no feasible alternative existed.

[15] See *Negron* v. *Wallace*, 436 F.2d 1139 (2d Cir. 1971).

versy between the parties over the provision of telephone services. When this litigation commenced, the MCC provided 23 pay telephones for local calls. But in September 1976, appellants advised counsel for the appellees that the number of telephones available for inmate use would be cut in half due to massive losses incurred by the New York Telephone Company as a result of fraudulently made telephone calls. On October 1, 1976, the trial court preliminarily enjoined the reduction, and mandated the installation of 23 telephones for long distance calls. The terms of this injunction are embodied in the final judgment.

Although pretrial detainees enjoy a first amendment right to communicate by telephone with persons outside the prison, that right has never been construed to mandate a special level of telephone service. *See e.g., Dillard* v. *Pritchess*, 399 F. Supp. 1225, 1240 (C.D. Cal. 1975). Accordingly, to require the MCC to return to court whenever it seeks to make any change, however minor, in its phone service, would place great strains on overburdened federal judges and would, in essence, preempt the role of prison officials.[16] Disputes of a kind just illustrated would

[16] For the same reason we must reverse the district court's order requiring the MCC to maintain precisely unchanged its present schedule for social visits. Pretrial detainees certainly have a first amendment to contact visits. *See, e.g., Miller* v. *Carson*, 563 F.2d 741, 748 (5th Cir. 1977). Moreover, visits should be as long as administrative manageability allows. *See Gilmore* v. *Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd*, 404 U.S. 15 (1971). But to require appellants to return to court whenever they seek to make even minor adjustments in the visiting hours constitutes an undue burden on the court and the administration.

We also strike the portion of the order, founded solely on an assertion of statutory jurisdiction, which requires the MCC to take commissary requests every other day rather than once a week. See also, our discussion of attire, *infra*, pp. 1222-1223.

best be handled by the inmate grievance procedure provided by the Bureau of Prisons, rather than federal courts.[17]

VII.

Overcrowding

a. *Double-celling*

Of the 389 rooms in the MCC designed for single occupancy, 121 were double-celled when Judge Frankel banned the practice in January 1977. Since the administrators of the MCC have made no showing of compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling, we affirm as to pretrial detainees. We remand for reconsideration the prohibition on double-celling of sentenced inmates for reasons we shall set forth.

In *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm*, 520 F.2d 392 (2d Cir. 1975), we found the confinement of two pretrial detainees in a single forty square foot cell in the Brooklyn and Queens houses of detention so "dehumanizing as to constitute an additional hardship beyond the need for custody in violation of the detainee's due process and equal protection rights." 520 F.2d at 397. The in-

[17] See Department of Justice, Bureau of Prisons Policy Statement No. 2001.6A (October 16, 1974).

fringements on privacy and personal dignity which underlay that decision are also present here.

Visual inspection of the rooms, coupled with the testimony of architect Paul Silver that double-celling was a "clear violation of the capability" of the MCC's individual rooms, led Judge Frankel to conclude that their basic structure mandated use by a single occupant. Indeed, the average room affords two inmates virtually no space for minimal privacy or in which to avoid the other's presence. Inmate testimony revealed that double-celling had produced numerous disagreements over the choice of activities within the room, and had spawned fights, charges of theft, and frequent involuntary physical contact as the two inmates passed each other in the narrow 35 square feet aisle of walking space.[18] Moreover, double-celling substantially taxed common area facilities. Judge Frankel found, for example, that insufficient dining accommodations had created "more pressure to eat in the cell, with its single chair, open toilet and unselected companion." [19]

Appellants argue that the average room at the MCC is nearly twice as large—75 square feet—than the cells involved in *Detainees*, and that other conditions at MCC are more pleasant. But we find the lack of privacy inherent in double-celling in rooms intended

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[18] Similarly, we found in *Detainees* that the confinement of two pretrial detainees together not only deprives each of his privacy but also increases tension and aggressive tendencies. *See* 520 F.2d at 396.

[19] 428 F. Supp. at 337.

for one individual a far more compelling consideration than a comparison of square footage or the substitution of doors for bars, carpet for concrete, or windows for walls. The government has simply failed to show any substantial justification for double-celling. In fact, since Judge Frankel's order in January 1977, the MCC has eliminated double-celling merely by reducing its permanent work "cadre" of convicted inmates designated to serve their sentences at MCC from 103 to 21. Although this diminution of the "cadre" has made the operation of MCC somewhat more difficult, administrative inconvenience can never excuse the deprivation of the constitutional rights of pretrial detainees. *Cf. Estelle* v. *Williams*, 425 U.S. 501, 505 (1976). Indeed, the reduction of the "cadre" has had the beneficial effect of opening more work opportunities to idle pretrial detainees and writ prisoners.

The trial court also banned double-celling of sentenced inmates on the ground that to quarter "an inferior minority of persons . . . in ways found unconstitutional for the rest" would constitute cruel and unusual punishment. *See* 428 F. Supp. at 339. This, of course, ignores our insistence that different and higher constitutional standards must be applied to pretrial detainees than to sentenced prisoners. As we noted earlier, appellants owe the convicted population merely the duty of providing adequate housing. We expect that on remand the trial court may well find that double-celling in a 75 square foot room violates the eighth amendment. Such an arrangement

allows each prisoner only 38 square feet of space in the individual room, well below accepted standards recommending the provision of 50 to 75 square feet of room space per inmate.[20] But, it appears that the "cadre" of sentenced inmates is housed in the Honor Unit, which contains rooms ranging in size from 100 to 150 square feet. We cannot say on the record before us that placing two sentenced inmates in rooms so spacious constitutes a *per se* violation of the eighth amendment.

b. *Balconies*

An average of 27 or 28 newly-arrived inmates sleep in the common areas of the MCC every night. At trial, individual inmates testified that stays in the common areas often stretch to a week or more. Since cots and personal belongings are inaccessible during the day, the balconied inmate is accorded, as Judge Frankel found, "literally zero square feet" of personal

[20] See note 22, *infra*, and the accompanying text. We note also that the Commission on Accreditation for Corrections of the American Correctional Association has recommended that individual cells have a floor area of at least 60 square feet. *See* Commission on Accreditation for Corrections, *Manual of Standards for Adult Correctional Institutions*, Standard 4142 (August 1977). And in *Ambrose* v. *Malcolm*, 414 F. Supp. 485, 492 (S.D.N.Y. 1976), Judge Lasker noted that the National Sheriffs' Association's *Handbook on Jail Architecture* (1975), 62-63, recommends that single occupancy rooms should average 70 to 80 square feet. *But see Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676, 690 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977 (1974).

living space. Such an inmate has no means of securing any degree of privacy. Moreover, sleeping is difficult because the balcony lights burn all night. Since appellants have offered no explanation for this completely inadequate housing except administrative convenience, we affirm Judge Frankel's prohibition of the practice. *See Todaro* v. *Ward*, *supra*, Slip op. at 156, n.8.

c. *Dormitories*

The dormitory unit, originally intended to hold ten inmates in each of its six rooms, now houses 120 sentenced inmates. As a result, the district court found, the situation within the dormitory unit "is one of intolerable crowding, strain, and distortion of facilities." 439 F. Supp. at 136. He ordered that a maximum of 60 inmates be housed in the dormitory unit.

While concurring in Judge Frankel's assessment that operation of the dormitory unit at 200 percent of "rated capacity", even when it is used solely for sentenced inmates is unacceptable, we find unwarranted his refusal to consider whether any number of inmates in excess of rated capacity could be suitably quartered within the dormitories. There is no constitutional magic to the term "rated capacity". Indeed, "[t]hose who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space." *Newman* v. *Alabama*, *supra*, 559 F.2d at 288.

Rather than clinging to the term "rated capacity" as the constitutional standard, we prefer to adopt

Judge Lasker's approach in *Ambrose* v. *Malcolm*, 414 F. Supp. 484 (S.D. N.Y. 1976), where he limited to 29 the number of pretrial detainees who could be confined for 23 hours a day in a cell-block consisting of a corridor, a small day room, and a dormitory "rated" for 24 inmates. The figure was derived from the American Correctional Association's standard providing that each inmate should be allowed a total of 75 square feet of living space.[21] To meet the needs of sentenced inmates, the Fifth Circuit, in *Williams* v. *Edward*, 547 F.2d 1206, 1215 (5th Cir. 1977), has found 50 square feet of sleeping space adequate. *See also Newman* v. *Alabama*, *supra*, 559 F.2d at 288.[22] In fact, if 15[23] sentenced inmates were housed

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[21] *See* 414 F. Supp. at 489, 493.

[22] This standard compares favorably with the National Sheriffs' Association's *Manual on Jail Administration* (1970) at 39, which suggests 55 square feet of space per bed in a dormitory, as well as the recommendation of the National Council on Crime and Delinquency Model Act for the Protection of Rights of Prisoners (1972) (§ 1b) that not less than 50 square feet of floor space be provided in the sleeping area, and with Army guidelines providing 55 square feet of sleeping space per prisoner. *See* 414 F. Supp. at 492-93. The American Correctional Association's Commission on Accreditation for Corrections has recommended that a minimum of 60 square feet be accorded each inmate housed in a dormitory unit. See Commission on Accreditation for Corrections, *Manual of Standards for Adult Correctional Institutions*, Standard 4144 (August 1977).

[23] We select 15 inmates as an example because Paul Silver testified that one set of "commonly accepted" criteria in prison design is the provision of one urinal, one toilet and one shower

in each MCC dormitory, every inmate would be allotted 58 square feet of space in the dormitory room and 32 additional square feet in the common area. We therefore remand to the district court for reconsideration of this issue.

Physical Constraints of Modular Confinement

As we noted above, except for the "cadre", the inmates of the MCC are permitted to leave their units only to go to the roof recreation area, sick call, or to court. This lack of movement severely limits inmate opportunities to attend religious services and educational and recreational programs which are normally given in only a few of the units. Expert testimony at the trial demonstrated that such restricted confinement over lengthy periods of time could have adverse psychological effects on some inmates. But, although appellants' own witnesses conceded that not all inmates at the MCC require the close custody inherent in strict confinement in the modular unit and that classification would permit freer circulation within the institution, no classification procedure, beyond the largely successful attempt to separate pretrial detainees from sentenced prisoners, exists at the MCC. The district court judge properly ordered ap-

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for 15 inmates. *See* Deposition of Paul Silver at 54. Thus, it appears that sufficient sanitation facilities may exist in the dormitories to support up to 15 inmates.

pellants to create additional classification guidelines to permit greater movement within the institution.[24]

Judge Frankel also decreed that no inmate may be held without consent at the MCC for more than 60 days. We find the 60-day limitation somewhat arbitrary. We agree that excessively long stays in the MCC may constitute a denial of due process. But, Judge Frankel's opinion supplies no factual basis for the selection of this particular demarcation point. And, since the statistical evidence in this case indicates that over 90 percent of unsentenced inmates are released within three months,[25] we are not persuaded that confinement in excess of 60 days transforms the MCC into a "long-term prison", as the trial court described it, except in several unusual cases.

But, even if the 60-day limitation was warranted under the conditions existing at the time of trial, Judge Frankel has now ordered the appellants to promulgate new classification standards to allow greater movement within the institution. If suffi-

[24] We reject appellants' protest that classification of pretrial detainees is impossible for the reasons stated in *Rhem I*, 507 F.2d at 338.

[25] Unfortunately, the statistics used by both the appellants and appellees in their briefs concern the length of stay of *all* inmates, sentenced and unsentenced. Analysis of the corrected affidavit of Marshall Haines, dated June 13, 1977, reveals that over half of the unsentenced detainees held in the MCC prior to trial during the period August 2, 1975 to August 13, 1976 spent ten days or less in the MCC. Three-quarters were released within a month, and more than 85 percent were released within 60 days, although one pretrial detainee was incarcerated for more than a year.

ciently liberal, the new guidelines may considerably ameliorate those very restrictive aspects of modular confinement which necessitated the imposition of the 60-day restriction. Accordingly, we direct appellants to prepare new classification standards within thirty days of this decision, and remand for reconsideration of the 60-day rule in light of those standards.

Finally, since the sole constitutional underpinning for the 60-day requirement was "due process", and there was no finding that longer confinement constituted cruel and unusual punishment, the time limitation should not have been applied to sentenced inmates, and should not be so applied if the trial court chooses to impose a similar time restriction on remand unless he finds that the longer confinement violates the eighth amendment.

Freedom of Speech and Communication

In the close and restrictive atmosphere of a prison, first amendment guarantees taken for granted in society at large assume far greater significance. The simple opportunity to read a book or write a letter, whether it expresses political views or absent affections, supplies a vital link between the inmate and the outside world, and nourishes the prisoner's mind despite the blankness and bleakness of his environment. Accordingly, courts have jealously protected the inmate in his exercise of first amendment prerogatives. *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Sostre* v. *McGinnis*, 442 F.2d 178, 199 (2d Cir. 1971) (*en banc*), *cert. denied sub nom. Oswald*

v. *Sostre*, 405 U.S. 978 (1972). Two of the MCC's policies, the "publisher only" rule and the reading of out-going nonprivileged mail, significantly intrude upon this protected realm.

Pursuant to a policy of the Bureau of Prisons, the MCC permits inmates to receive books and other publications from outside the institution only if the item comes directly from the publisher or a book club. Ostensibly, the practice is justified by substantial security problems, giving rise to administrative difficulties in processing reading materials received from all sources. Judge Frankel noted that the MCC could adequately protect its legitimate interests merely by inspecting books and magazines for contraband. He observed, further, that other institutions have not recorded untoward experiences with far less restrictive rules.

The "publisher only" rule severely and impermissibly restricts the reading material available to inmates. We agree with those courts which have struck down such limitations as inconsistent with both the first amendment and due process. *See, e.g., Cruz* v. *Hauck*, 515 F.2d 322, 333 (5th Cir. 1975) ("publisher only" rule invalidated as to receipt of legal periodicals); *Rhem* v. *Malcolm*, 371 F. Supp. 594 (S.D.N.Y. 1974).[26] While it is true that the MCC's

[26] Appellants urge that we follow the reasoning of *Woods* v. *Daggett*, 541 F.2d 237 (10th Cir. 1976) to reach a contrary result. While *Woods* upheld a "publisher only" rule, it made clear it was doing so within the limited context before it:

> . . . Nevertheless, while the constitutional claim is not wholly insubstantial, when we consider the circumstances of the maximum security institution the size of Leavenworth, and the risks involved if searches of materials sent to such numbers of inmates should not detect contraband, we [sustain] the policy in question.

Certainly, the inmates at the MCC cannot be compared to the admittedly more dangerous population at Leavenworth and, accordingly, justification of security are far less compelling.

library collection mitigates some of the harshness of the rule, it is obvious that many books sought by inmates are available neither in the library nor directly from a publisher. And it is inconceivable that the first amendment rights of an incarcerated individual do not extend beyond a few, selected titles. *Benjamin* v. *Malcolm*, 75 Civ. 3073 (S.D.N.Y. November 18, 1975).

MCC personnel also randomly and routinely read outgoing, nonprivileged mail. The institution's administrators rationalize this inspection as a proper method of monitoring escape plans or other threats to security. Judge Frankel concluded that since social visits and telephone calls are not monitored, the mail security justification was meaningless. He ordered the facility to refrain from reading inmate correspondence absent good cause.

The postal carrier may not be turned back at the jailhouse gate. The right to receive and send mail is unquestionably protected by the first amendment. *Blount* v. *Rizzi*, 400 U.S. 410 (1971). *See also* Sigler, *Freedom of the Mails: A Developing Right*, 54 Geo.

L.J. 30 (1965). The Fifth Circuit, in *Taylor* v. *Sterret*, 532 F.2d 462, 481 (1976), recently observed:

> [c]orrespondence is a principal method available to prisoners to communicate with private and public individuals or entities . . . . Jail practices which inhibit this medium therefore create a serious impediment to a prisoner's communicative capability.

Indeed, in *Procunier* v. *Martinez*, *supra*, the Supreme Court acknowledged an inmate's interest in utilizing this basic medium when it struck down prison regulations permitting broad censorship of prison correspondence.

It cannot be gainsaid that the reading of mail by jail officials chills the expression of first amendment rights by corespondents inside and outside the institution. It takes little more than common sense to realize that a tender note, so important to the morale of the incarcerated individual, might never be penned if the writer knew that it would first be scrutinized by a guard.[27] And, certainly, where social visits and telephone calls are left unmonitored, a spurious claim of

[27] Judge Frankel observed that mail can still be inspected for contraband, and where good cause is shown, outgoing mail can be read. *See Sostre* v. *McGinnis*, 442 F.2d 178 (1971) (*en banc*), *cert. denied sub nom. Oswald* v. *Sostre*, 405 U.S. 978 (1972). We note, in addition, that Judge Frankel found no justification for the MCC's policy not to forward mail. We too fail to see any legitimate reason for the continuation of this restrictive practice.

security cannot vindicate infringement of so basic a right.[28]

Unreasonable Searches and Seizures

When an individual is detained, he or she unfortunately relinquishes some part of those rights to privacy and protection against unreasonable searches and seizures possessed by unincarcerated members of society. Yet, few will dispute that, whatever the circumstances, the existence of a realm in which privacy is safeguarded is fundamental to decent treatment of an inmate. *Cf. Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Indeed, every effort should be made to preserve those conditions which foster human dignity. *See Bonner* v. *Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975). Two practices at the MCC, the removal of inmates during room searches and bodily strip searches, denigrate this basic right.

a. *Strip Searches*

By far the most humiliating and degrading procedure at the MCC is the so-called "strip search." After receiving a visitor, every inmate is, without cause, routinely ordered to strip naked and to display his armpits and the bottom of his feet. If a

[28] In *Smith* v. *Shimp*, 562 F.2d 423 (7th Cir. 1977), the Seventh Circuit upheld a practice of reading outgoing, non-privileged mail. There is no indication in that opinion, however, whether other means of communication between inmates and outsiders were left unmonitored. In any event, we decline to follow the ruling of that court.

male, he must lift his genitals, and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates are also scrutinized. Judge Frankel left the basic strip-search procedures undisturbed, but found that anal and genital searches "plunge" the inmate into a "deep level of degradation and submission" not warranted by the record before him. *See* 439 F. Supp. at 147. He prohibited inspection of the genitals and anus unless there is probable cause to believe that the inmate is secreting contraband.

While other courts have permitted searches of body cavities where a substantial security justification has been demonstrated, in this case appellants proved only one instance in the several years of its existence when contraband was found during a body cavity inspection. The gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility. To speak plainly, in the circumstances presented by this record, the procedure shocks one's conscience. *See Rochin* v. *California*, 324 U.S. 167 (1952). Accordingly, we affirm Judge Frankel's order on strip searches.

b. *Room Searches*

During a formal "shakedown" at the MCC, a residential unit is cleared of inmates and a search conducted. Inmates are not permitted to observe searches of their rooms. Correctional officers also may bar an

inmate from viewing the more frequent "spot" searches of a particular room. The practice was instituted ostensibly to minimize conflict between residents and officers over the search, to remove possible distractions to those conducting the search, and to thwart attempts to conceal contraband.

Judge Frankel held that this procedure could not be countenanced when applied to pretrial detainees. He found that correctional officers often lacked any respect for the personal possessions of inmates and were far from neat, and sometimes destructive, in conducting searches. Indeed, since inmates suspected the officers of thievery, searches were a festering source of tension. In short, the practice in actual operation, constituted a "regime of absolute and unquestionable tyranny." [29]

We see no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege to grant him and reassures the detainee's already diminished sense of control over self, that he still has some small private domain, while at the same time not interfering with the institution's security concern and the removal of possible contraband. *See*

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[29] 428 F. Supp. at 342. Judge Frankel also required that receipts be given for seized property, and that certain minimal procedures be provided for enabling an inmate to challenge a seizure. The basic principles of due process which require the institution to account for such property are so well-established that we need not dwell long in affirming this aspect of Judge Frankel's order. *See McClennon* v. *Rosetti*, 460 F.2d 111 (2d Cir. 1972).

Giampetruzzi v. *Malcolm*, 406 F. Supp. 836 (S.D. N.Y. 1975). And, of course, any detainee who becomes obstructive may be removed from the vicinity of his room.

c. *Packages*

Inmates at the MCC are not permitted to bring into the institution or to receive from the outside, items of personal property, including electric shavers, typewriters and wrist watches. Moreover, food packages, with the exception of one package at Christmas, are forbidden. Appellants defend these limitations, claiming that personal property brought into the jail would open the door to buying favors, gambling activities, and "strong arm tactics." The appellants also urge the food restrictions are necessary to avoid sanitation and storage problems.

Judge Frankel found these justifications meritless. He ordered the appellants to promulgate reasonable regulations to permit receipt of at least items of the sort available from the commissary.

Other institutions have far more liberal rules governing the receipt of packages than the severely restrictive regulations of the MCC. *See, e.g., Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836, 842 (S.D.N.Y. 1976) (New York City House of Detention); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 496 F.2d 1196 (1st Cir.), *cert. denied sub nom. Hall* v. *Inmates of Suffolk County Jail*, 414 U.S. 977 (1974). And there is no indication that this greater liberality has resulted in

unmanageable difficulties. Since the district court's decree did no more than instruct the MCC to devise reasonable regulations regarding packages, it is not inconsistent with the tenet that prison officials should retain as much control as possible over their institutions. Appellants may appropriately place a ceiling on the permissible dollar value of goods received into the institution and restrict the number of packages. In so doing, it may satisfy its legitimate security and storage concerns but, at the same time, we are sure it will not impose draconian limitations.

d. *Typewriters*

Judge Frankel decreed that inmates should be permitted to possess typewriters, for their personal use. But we can perceive no constitutional right to a typewriter as an incident to the right of access to the courts. *See Tarlton* v. *Henderson*, 467 F.2d 200 (5th Cir. 1972). And while it may be true, as Judge Frankel poignantly noted, that "typed papers . . . leap more vividly than handwritten ones to the watery judicial eye," such a vivid rhetorical flourish on the value of the typewriter cannot justify a gross intrusion into prison administration. In short, the MCC's judgment that the particular problems of security, storage, and theft arising from inmates' ownership of typewriters must override the desire of some to possess them.[30]

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[30] In any event, a limited number of typewriters—one on each residential unit—is provided to inmates. Their presence, coupled with the fact that most inmates are represented by

Attire

Neither pretrial detainees nor sentenced inmates at the MCC are allowed to wear their own clothes. Instead, they are issued colored jumpsuits. Appellees claim, and the trial judge found, that these jumpsuits are garish, ill-fitting, degrading and humiliating to wear. Accordingly, he required the MCC to permit pretrial detainees to wear their own clothes unless they volunteer to wear correctional uniforms.

We do not doubt that the jumpsuits are aesthetically obnoxious to some inmates. But the MCC has demonstrated a legitimate security interest in readily identifying inmates that outweighs the inmates' understandable desire to control their own appearance. *Cf. East Hartford Education Association* v. *Board of Education*, 562 F.2d 838, 860 (2d Cir. 1977) (*en banc*).

Certainly, the MCC could satisfy its need to easily identify inmates in a manner less degrading and humiliating by requiring, for example, that they wear shirts and pants of a certain type and color. Indeed, we urge them to do so. But we would be hard-pressed to decide that such questions—ultimately of taste—rise to "litigable magnitude" and are not issues to be resolved by prison administrators. *See* Kaufman, 39 Brooklyn L. Rev. xiii, xv (1973).

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counsel and do not need typewriters on which to fashion legal documents, argue strongly against allowing personal possession of typewriters as a necessity for access to the court.

Access to the Courts

When this action was instituted, most attorney visits were made in the general visiting rooms during visiting hours—thereby entailing long delays, limiting the attorney's time with his client, and totally vitiating confidentiality. Moreover, attorneys frequently found it impossible to go to the MCC during the brief (4:30 to 6:30 p.m.) attorney visiting hours. Attorney visits at any other hours required 24 hour notice to the institution. As a result, an inmate's access to legal counsel was often severely constrained. Prior to trial, the MCC opened a special attorney visiting room and extended attorney visiting hours from 8 a.m. to 8 p.m., for seven days a week. The judgment requires the appellants to maintain this schedule.

Judge Frankel also ordered that the MCC make its law library physically accessible to inmates during reasonable hours, and that the library contain an adequate collection of federal law materials, including the addition of some volumes and the replacement of others. He required the appellants to provide access to state law materials upon request.

We affirm these orders. As we made clear in *Sostre* v. *McGinnis*, *supra*, 442 F.2d at 189, "[t]he Constitution protects with special solicitude, a prisoner's access to the courts." *See also Bounds* v. *Smith*, 430 U.S. 817 (1977); *Johnson* v. *Avery*, 393 U.S. 483 (1969). Indeed, one of the most serious deprivations suffered by a pretrial detainee is the curtailment of

his ability to assist in his own defense. And sentenced prisoners often experience similar frustrations in bringing their grievances to the attention of the courts. Appellants' prior practices in regard to both attorney visits and the law library unreasonably burdened the inmate's opportunity to consult with his attorney and to prepare his defense, and were properly enjoined. *See Zurak* v. *Regan*, 550 F.2d 86 (2d Cir. 1977).

VIII.

We regret the prolixity of this opinion, but the nature of the questions raised in the lower court and the accumulation of detailed complaints have made such length unavoidable if we were to deal properly with the trial judge's decree. In actuality, we have here decided not one, but twenty cases relating to specific conditions at the MCC.[31] That fact, in all candor, is ominous, for it represents the growing involvement of the courts in all aspects of prison administration. Of course, such intercession is anathema to prison administrators whose decisions are scrutinized. But, in many instances, the actions of the best intended courts are counterproductive for the inmates themselves, who could sooner find redress of their grievances through nonjudicial means, such as arbitration and mediation or in this case, the Bureau of Prisons' inmate grievance procedure.

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[31] Except as noted in this opinion, the judgment of the district court is affirmed in all respects.

Perhaps, at this juncture, Elbert Hubbard's caution that a word to the wise is usually resented will not prove true. It is important for courts to involve themselves with those conditions that violate the Constitution. But it is equally important that courts be spared from adjudicating petty matters that do not rise to litigable magnitude and could be resolved more quickly and more satisfactorily by discussions between the inmate or his representatives and prison administrators.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of January one thousand nine hundred and seventy-eight.

Present:

HON. IRVING R. KAUFMAN
Chief Judge

HON. WILLIAM H. TIMBERS

HON. THOMAS J. MESKILL
Circuit Judges

77-2035
77-2135

LOUIS WOLFISH, HELEN ROMERO, SHERMAN GREENE, ESTELLA FERNANDEZ, MARYANNE CALLAHAN, MARY JORDAN, RUTH SMITH, FRANCIS WOODS, CARMEN ESTRADA, BIRCHEL L. CARSON, WILLIE S. MCCARTHA, JR., CHARMAINE ROBINSON, MILDRED SKEETE, M. RUSSELL, GERALDINE HARKER, DORIS TORRS, CYNTHIS EDWARDS, and DANA DYNES, REALTORS-APPELLEES,

v.

UNITED STATES OF AMERICA, EDWARD H. LEVI, individually and as the Attorney General of the United States of America, NORMAN CARLSON, individually and as the Director of the Bureau of Prisons of the United States of America, LARRY TAYLOR, individually and as the Warden of the New York City Metropolitan Correctional Center of the United States of America, THOMAS J. CAHILL, individually and as the United States Attorney for the Southern District of New York, WAYNE B. COLBURN, individually and as the Director of the United States Marshals Service and FRANK A. JULIANO, individually and as the United States Marshal of the Southern District of New York, RESPONDENTS-APPELLANTS.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in part, reversed in part and the action be and it hereby is remanded in part to said district court in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER,
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of February, one thousand nine hundred and seventy-eight.

Present: HONORABLE IRVING R. KAUFMAN,
Chief Judge.

HONORABLE WILLIAM H. TIMBERS,

HONORABLE THOMAS J. MESKILL,
Circuit Judges.

77-2035

77-2135

UNITED STATES OF AMERICA EX REL.
LOUIS WOLFISH, ET AL., PETITIONERS-APPELLEES,

—against—

THE HONORABLE EDWARD LEVI, ET AL.,
RESPONDENTS-APPELLANTS.

Respondents-appellants having filed a motion to enlarge the time within which respondent-appellants

may petition for rehearing, or suggest rehearing en banc, to and including March 9, 1978 and to stay issuance of the mandate to April 24, 1978,

IS IS ORDERED:

1) The motion is hereby granted.

2) The final sentence beginning on page 1209 of the slip opinion is amended to read:

> Inmate testimony in *Detainees* revealed that double-celling had produced numerous disagreements over the choice of activities within the room, and had spawned fights. charges of theft, and frequent involuntary physical contact as two inmates passed each other in the narrow aisle of walking space.[18]

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

/s/ William H. Timbers
WILLIAM H. TIMBERS

/s/ Thomas J. Meskill
THOMAS J. MESKILL
Circuit Judges

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000 MEF

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH, et al., PETITIONERS

—*against*—

THE HONORABLE EDWARD LEVI; NORMAN A. CARLSON, Director, United States Bureau of Prisons; LARRY TAYLOR, Warden, Metropolitan Correctional Center, RESPONDENTS

PARTIAL JUDGMENT

FRANKEL, D. J.:

The petitioner class which, by order of this Court dated December 23, 1975, consists of all persons who are or will be confined in the Metropolitan Correctional Center ("MCC"), 150 Park Row, New York, New York having moved this Court for partial summary judgment; and the respondents having moved for partial summary judgment; and the Court having ordered summary judgment with respect to double-celling; receipt of books, periodicals, and other materials; receipts for the seizure of inmate possessions; and mail; and the Court having granted partial summary judgment in favor of the respondents on other issues; and the Court having heard testimony and received other evidence as to other issues in the

case; and the Court having considered the affidavits, transcripts, exhibits, and memoranda, and having toured the facility; and having considered all papers and proceedings herein; and the Court having dismissed certain of petitioners' claims at the close of their case; and the Court having rendered its decision and issued an opinion on September 15, 1977 on all the issues except those relating to health care; and there being no just reason to delay entry of this partial judgment, now therefore judgment is entered and it is hereby

ORDERED that respondents, their agents, employees, and successors, and all persons acting in concert with them, be, and they hereby are, enjoined from confining any member of the petitioner class at MCC except under the following conditions:

CLASSIFICATION

(1) (a) Within 90 days of entry of this partial judgment respondents shall prepare and institute a system to classify and separate pretrial detainees from sentenced inmates, and classify and separate those inmates who pose a serious threat of violence, escape or attempt to escape from those inmates who do not pose such dangers. Said system of classification and separation shall include the following exceptions:

(i) respondents are permitted to assign both pretrial detainees and sentenced inmates to the following housing units at the MCC:

(A) the women's unit;

(B) the protective custody unit;

(C) the high security unit;

(D) the hospital.

(ii) At any time when the MCC is approaching its capacity, either overall or as to a particular type of unit under this classification system, respondents shall use their best efforts to maintain the classification and segregation set forth above and, at such times, should an inmate be assigned to a unit not otherwise the properly designated one (i.e., a pretrial detainee assigned to a sentenced unit), respondents shall reassign such inmates to the properly designated unit as soon as a room becomes available in such unit.

(b) For the purposes of this order, an inmate convicted of a state, local or federal offense who is at the MCC pursuant to a writ from any local, state or federal correctional, detention or penal institution, whether or not said inmate still has other criminal charges pending against him, shall be considered and classified in the same category as a sentenced inmate and shall not be considered or classified as a pretrial detainee.

LENGTH OF CONFINEMENT AT THE MCC

2(a) Within 14 days after entry of this partial judgment, no inmate incarcerated or detained at the MCC on that date or subsequent thereto may be in-

carcerated or detained at the MCC for a period of more than 60 consecutive days without said inmate's voluntary written consent thereto.

(b) As soon as it is known by officials at the MCC that an inmate's incarceration or detention at the MCC will exceed 60 consecutive days, and in any event no later than one week prior to expiration of the aforesaid 60 day period, the inmate shall be informed, by written communication, of his or her right to be transferred from the MCC. Within five days after an inmate is advised of his or her right to be transferred under this provision, said inmate shall advise the MCC in writing whether he or she wishes to be transferred or whether he or she wishes to waive transfer and remain at the MCC. Nothing contained herein shall preclude the respondents from transferring an inmate from the MCC at any time before or after expiration of the aforesaid 60 day period.

(c) Within 14 days after entry of this partial judgment, the respondents shall prepare a written form for use in notifying those inmates to whom paragraph 2(b) applies of their rights under paragraph 2(a) and (b); said form shall also include the following:

(i) A space wherein the inmate shall notify the MCC, in writing, of his or her decision to exercise his or her right of transfer or waive said right, acknowledging that said decision is being made voluntarily;

(ii) A space to indicate the legal status of the inmate (*i.e.*, pretrial or sentenced) and the date the inmate was discharged or transferred from the MCC.

(d) Respondents shall maintain and keep a file of all forms executed by inmates pursuant to paragraph 2(b) and (c), and said file shall be available for inspection and copying, upon reasonable notice, by counsel for petitioners.

MUSLIMS' DIETARY REQUIREMENTS

3(a) Respondents are hereby enjoined from providing observant Muslim inmates pork-free meals which consist of deleting the pork item from the meal and substituting an extra helping of potatoes or other vegetable.

(b) Respondents shall forthwith provide observant Muslims with the same pork-free meals provided to observant Jews or shall provide said observant Muslims with meals which are substantially identical in nutritional value to those served to observant Jews.

LAW LIBRARY

4(a) Within 90 days of entry of this partial judgment, respondents shall prepare and submit to the Court and counsel, for implementation upon approval by the Court, a plan to provide inmates who are *pro se* in any criminal or civil proceeding pending in any court with physical access for reasonable periods of time to adequate law library facilities for the purpose of preparing the documents by which to commence, maintain or defend such a proceeding notwithstanding that the court before which the inmate is appearing has the discretion to appoint counsel once the action has begun (18 U.S.C. § 3006(A)(j)), and whether or not the inmate is represented by counsel in another proceeding. Nothing contained herein shall limit the right of the respondents to deny an inmate physical access to said law library subsequent to the appointment or retention of counsel in the proceeding in which said inmate had therefore proceeded *pro se*.

(b) The means by which respondents may choose to comply with the requirements of paragraph 4(a) include but are not limited to transporting the affected inmates to local law libraries, expanding the law library facilities and materials at the MCC and permitting the affected inmates physical access to that law library, and establishing a program of legal services within the MCC.

(c) Should respondents elect to comply with the provisions of paragraph 4(a) by providing the affected inmates with physical access to the law library facilities within the MCC, respondents shall undertake as part of their compliance the following measures:

(i) Prepare an updated and accurate list of all volumes contained in the MCC law library;

(ii) Acquire and maintain as part of the MCC law library (and to be included in the list described in paragraph 4(c)(i)) one set of the Federal Second and Federal Supplement series extended back to

1950; volumes presently missing from the series now stocked; a complete set of the Modern Practice Digest series; and add the Federal Practice Digest Second series. Said additions to the law library shall be made within 90 days of the Court's approval of the respondents' plan for compliance;

(iii) Provide inmates with access to state law materials through some lending arrangement with local law libraries;

(iv) Provide adequate space for the law library so that a reasonable number of inmates may use the facilities at the same time.

(v) Schedule the hours of operation for the law library so that it is available for inmate use five days per week, for a reasonable period each day.

5(a) Respondents shall not prohibit inmates at the MCC from acquiring or possessing their own typewriters while incarcerated or detained at the MCC.

(b) Respondents may inspect said personal typewriters for contraband before permitting the inmate to possess and maintain said typewriter at the MCC.

COMMISSARY

6(a) Inmates at the MCC shall be permitted to submit purchase orders to the MCC commissary on an every other day basis. A purchase order shall be filled by the MCC and delivered to the ordering inmate within 24 hours after submission of the order.

(b) The commissary order form provided to inmates shall include a provision for the inmate to

make a second choice among the available items in the event that one or more of the inmate's first choice of items is not available.

(c) Nothing contained herein shall preclude the respondents, if they choose, from establishing a commissary system which provides inmates with direct access to the commissary on an every-other-day basis.

(d) Respondents are hereby enjoined from endorsing checks or money orders made to the order of an inmate without the inmate's written consent thereto. Respondents may endorse an inmate's check or money order only on written consent of the inmate after written notice that he may refuse to give such consent and that in the event of refusal to consent, respondents will permit said inmate to endorse checks and money orders. Nothing contained herein shall be interpreted to require separate written consent for each check or money order in the event that an inmate has signed the above described notice and consent form. An inmate who has given the above-described consent may, upon written notice delivered to his or her unit manager, revoke said consent.

(e) Respondents shall credit checks to the appropriate inmate's commissary account within 15 days in the case of checks drawn on a bank located within the continental United States, and within 30 days in the case of checks drawn on a bank located outside the continental United States, from the date that

(i) the check is received and endorsed by the MCC pursuant to the inmate's consent as set forth in paragraph 6(d); or

(ii) the inmate gives the check to the MCC after said inmate has personally endorsed the check pursuant to paragraph 6(d).

The 15-day and 30-day period set forth herein may be extended for a longer period for good cause communicated to the inmate in writing.

CAPACITY OF MCC

7. Within 60 days of entry of this partial judgment, and except as provided in paragraph 9(b) below, respondents shall not house more than 10 inmates in each of the six dormitory rooms on Unit 11 South at the MCC, or more than a total of 60 inmates in that unit.

8. Within 30 days of entry of this partial judgment, and except as provided in paragraph 9(b) below, respondents shall not house inmates on beds placed in corridors, balcony areas or commons areas.

9(a) Except as set forth below, the inmate population at MCC shall not be permitted to increase to more than 449 inmates, to be allocated among the units as follows:

2nd Floor	Not more than 29 inmates
3rd Floor	Not more than 24 inmates
5-N	Not more than 48 inmates
5-S	Not more than 48 inmates
7-N	Not more than 48 inmates
7-S	Not more than 48 inmates
9-N	Not more than 48 inmates
9-S	Not more than 48 inmates
11-N	Not more than 48 inmates
11-S	Not more than 60 inmates

(b) In the case of an emergency certified in writing by the Warden, and for a period not to exceed ten days, the capacity of the MCC may be increased beyond 449 as set forth above by temporarily housing more than 10 inmates in one or more of the dormitory rooms on Unit 11 South, or housing inmates on beds on a corridor, balcony or commons area in one or more of the units, or by placing two inmates in one or more of the individual rooms throughout the MCC. In the event of such an emergency, a copy of the written certification from the Warden shall promptly be forwarded to the Court and counsel for petitioners; said certification shall set forth the facts underlying and the reasons for invoking this emergency provision and shall indicate the present extent of the increase in capacity above 449, and the expected duration of the emergency. By the end of the aforesaid 10 day period, the inmate population at MCC shall be at or below 449 unless this Court, by specific order, permits otherwise.

SOCIAL AND FAMILY VISITING

10. Respondents shall maintain and continue the following hours, practices, and procedures for family and social visits at the MCC:

(a) Visiting hours at the MCC shall be maintained as set forth below:

Days	Hours	Unit
Tues-Friday	12:30 PM to 4:00 PM 5:30 PM to 8:30 PM	All Units
Saturday	8:30 AM to 12:00 PM	3, 7N, 7S, 11N, 11S
	12:30 PM to 4:00 PM	2, 5N, 5S, 9N, 9S, 11S
Sunday	8:30 AM to 12:00 PM	2, 5N, 5S, 9N, 9S, 11S
	12:30 PM to 4:00 PM	3, 7N, 7S, 11N, 11S

When Monday is a legal government holiday, the Sunday visiting schedule shall prevail.

(b) Notwithstanding the provisions contained in paragraph 10(a) above, respondents are permitted to reduce the visiting hours for the 11-South Dormitory Unit by 3½ hours on either Saturdays or Sundays at such time as that unit is reduced to a population of 60 inmates pursuant to paragraphs 7 and 9 above.

(c) The bathrooms located in the visiting rooms shall be kept open for use by visitors (but not inmates) and shall be locked only by the visitor using such facility.

(d) Each inmate shall be entitled to receive three visits per week. Conditions permitting, the maximum visiting time per visit shall be the entire visiting period. In the event of overcrowding (more than 25 persons in any visiting room), the visiting room officer may reduce the visiting time allowed, but in no event may the duty officer reduce a visit to less than one hour. Only in the event of extreme overcrowding, and then only when that determination is made by

the duty correctional supervisor, may a visit be shorter than one hour. In the event of such extreme overcrowding, visiting hours may be extended.

(e) Visits are limited to three persons visiting one inmate at a single time. An inmate's children under the age of 16 are not included in this three-person limit. If additional family members are present, the visit should be divided into two groups, each group visiting for half the allotted visiting period. Each visiting period shall be counted as one visit for purposes of calculating the number of visits allowed per week.

(f) Each inmate shall be permitted to identify six friends or relatives for his or her approved visitors list. Children under the age of 16 are not to be counted in the limitation of six visitors. Inmates shall be permitted regular opportunities, but not more than once per week, to change the names of visitors on their approved list.

(g) Respondents shall continue to authorize special visits under circumstances authorized prior to this order.

(h) The hours and procedures described in paragraph 10(a) through (g) may be reduced or diminished only after notice to the Court and counsel for petitioners upon a showing of good cause, and such reduction or diminution shall not be made less than 30 days after such notice to the Court and counsel for petitioners, and only after approval by the Court.

ATTORNEY VISITS

11. Respondents shall maintain and continue the following hours, practices, and procedures for attorney visits at the MCC:

(a) Attorney visits shall be permitted from 8:00 a.m. to 8:30 p.m., seven days per week, with no requirement that prior notice of the visit be given except when special accommodations or facilities are necessary;

(b) The attorney conference room on the third floor, consisting of five individual rooms with doors and a large, common space provided with tables, shall be maintained;

(c) The MCC shall continue to expedite the processing of attorneys;

(d) The special filing cabinets for inmate visitors' lists shall be maintained;

(e) Respondents shall continue to monitor the attorney conference area to assure that attorneys are given prompt entrance to and exit from the conference area; and

(f) Attorneys shall be given, after processing, an identification pass and will be permitted to proceed unescorted except if, on a case-by-case basis, it is determined by respondents that such unescorted access would pose a threat to the security of the institution or individuals therein; and

(g) The hours and procedures described in paragraph 11(a) through (f) may be reduced or diminished only after notice to the Court and counsel for

petitioners upon a showing of good cause, and such reduction or diminution shall not be made less than 30 days after such notice to the Court and counsel for petitioners, and only after approval by the Court.

VISITS WITH CO-DEFENDANTS

12. Respondents shall permit co-defendants in a case who are incarcerated or detained at the MCC to engage in joint legal visits unless a specific court order is in force directing otherwise.

TELEPHONES

13. Respondents shall continue to provide telephone service for inmates at MCC as set forth below.

(a) Local calls

The current total of 23 pay telephones shall continue to be "restricted dialing," permitting calls to only the 212 area code. The distribution of these telephones shall remain as follows:

Unit	Number of Pay Telephones
Honor Unit	1
Hospital Unit	1
3	2
5-N	2
5-S	2
7-N	2
7-S	2
9-N	2
9-S	2
11-N	3
11-S	4

These telephones shall continue to be available for inmate use from 6:30 a.m. to 11:00 p.m., except during counts or emergencies.

(b) Long-distance calls

(1) Respondents shall continue to operate 22 long-distance telephones on an 11 trunkline system routed through the MCC switchboard. These long-distance telephones shall continue to be distributed as follows:

Unit	Number of Long-Distance Telephones
Honor Unit	2
3	2
5-N	2
5-S	2
7-N	2
7-S	2
9-N	2
9-S	2
11-N	2
11-S	4

(2) Inmates shall continue to be permitted to make (i) collect calls without following the procedures hereinafter described in subparagraphs (A) through (F); and (ii) calls charged to their commissary accounts in the manner hereinafter described in subparagraphs (A) through (F) through the MCC long-distance switchboard. Advance written authorization by the inmate shall be required for each call an inmate wishes to charge to his commissary account. Such a commissary charge shall be made in the following manner:

(A) An inmate must convey a written authorization for each commissary charge call, including the telephone number to be called, to the MCC commissary by presenting such authorization to a designated housing unit officer. A separate authorization must be submitted for each such call;

(B) If the inmate's commissary account has a balance of at least $10 and the requested charge call is within the continental United States, the written authorization for a commissary charge call must be presented to the designated housing unit officer at least four hours prior to the time the inmate wishes to place the call, and upon its approval by the MCC commissary, the said authorization shall be delivered to the long-distance operator;

(C) An inmate whose commissary account reflects a balance of less than $10 or who wishes to charge a call to a destination outside the continental United States shall present the required authorization to the designated housing unit officer at least 24 hours in advance of the time the inmate wishes to place the call so that MCC officials may confirm in advance that the inmate's account reflects sufficient funds to pay for the cost of the call;

(D) At the time an inmate wishes to make a commissary charge call for which he has previously submitted written authorization as provided in (2)(A) through (2)(C), said inmate using the long-distance telephone in his housing unit, (i) shall identify himself to the long-distance operator, and (ii) shall iden-

tify the call he wishes to charge to his commissary account. The operator, upon determining that the inmate has provided the appropriate written authorization and that the MCC commissary has approved said call, shall place the call;

(E) Inmates shall be provided a written receipt for each commissary charge call made; and

(F) If an inmate's commissary account contains insufficient funds to meet the requirements of (2)(B) or (2)(C) above, the long-distance operator shall not place the requested commissary charge call.

(c) Miscellaneous provisions for long-distance calls.

(1) All long-distance calls shall be limited in length to 10 minutes. This 10-minute period shall commence when the called party answers the telephone.

(2) A sign-up list shall be posted near each long-distance telephone for collect and pre-paid calls in order to encourage orderly and equitable use of the telephones.

(3) Emergency need for a telephone, including instances in which an inmate does not have funds to pay for a needed telephone call, shall be handled on a case-by-case basis, as is the current MCC policy.

(4) Inmates lodged in the hospital unit shall be given access to long-distance telephones on an individual basis.

(5) The long-distance switchboard shall be open eight hours each day, seven days per week, except during counts or emergencies, from 1:00 p.m. or 7:00

p.m. to 9:00 p.m. or 11:00 p.m. as respondents may determine.

(6) Nothing contained herein shall prohibit the respondents from requiring inmates to make telephones calls to destinations overseas through the institutional telephone system rather than the above-described long distance telephone system.

(d) The hours, procedures and facilities described in paragraphs 13(a) through (c) above may be reduced or diminished only after notice to the Court and counsel for petitioners upon a showing of good cause, and such reduction or diminution shall not be made less than 30 days after such notice to the Court and counsel for petitioners, and only after approval by the Court.

MAIL

14(a). Respondents and their employers shall open incoming "Special Mail" only in the presence of the inmate for inspection for physical contraband.

(b) "Special Mail" shall include any letter from any of the following persons or institutions:

(i) letters from attorneys;
(ii) letters from federal courts;
(iii) letters from state courts;
(iv) letters from members or committees of Congress;
(v) correspondence from embassies and consulates;

(vi) correspondence from the United States Department of Justice or any of its divisions;
(vii) correspondence from state governors;
(viii) correspondence from state attorneys general; and
(ix) correspondence from prosecuting attorneys.

15. Respondents shall forward mail received at the MCC for an inmate who has been transferred to another institution or who has been released.

SEARCHES

16(a). Respondents and their employees are enjoined from conducting a visual search of the anus or genitals of an inmate, except that respondents and their employees are permitted to require an inspection of the genitals and anus upon a specific and particular showing of probable cause to believe that the inmate is concealing contraband in his or her genital or anal area. Such probable cause must be recorded in writing, upon sworn statements of first-hand knowledge, with a written record of the reasons, results, and circumstances of each such search. A copy of such written record shall be given to the inmate, and a copy shall be maintained and preserved by the respondents. In the event such examination occurs, it is to be conducted in private and in the presence of only those persons whose presence is essential for reasons of security.

(b) Nothing contained in paragraph 16(a) shall limit the right of respondents and their employees to

require an inmate to undergo the following inspection after a contact visit:

(i) Remove all clothing including underwear;
(ii) Raise arms, present open hands, lift feet, run fingers through hair and open mouth;
(iii) Have all clothing inspected.

Said inspection shall be conducted in private, in the presence of only those persons necessary for security.

17(a). Each pretrial detainee, excluding writ cases as set forth in paragraph 1(b) above, shall be permitted to observe a search of the residential room, or sleeping space within a dormitory room, to which said detainee has been assigned, except that should a detainee attempt to disrupt the search of his or her room or dormitory space or remove anything from his or her room or dormitory during the search said detainee may be removed from the area of the search and the search may be continued without said detainee's presence.

(b) Notwithstanding the requirements of paragraph 17(a) above, individual residential rooms within the MCC or the six dormitory rooms in Unit 11 South to which pretrial detainees are or may be assigned may be searched, without the presence of the detainee, upon a showing of good cause approved in each instance in advance in writing by the Chief Correctional Supervisor, an Associate Warden, or the Warden. At the time of such a search or as promptly thereafter as practical, each detainee whose room or dormitory space was searched pursuant to

this provision shall be given written notice of said search.

SEIZURE OF CONTRABAND

18. Within 90 days of entry of this partial judgment, respondents shall prepare and submit to the Court and counsel, for implementation upon approval by the Court, a statement of procedures by which an inmate may contest the confiscation and forfeiture of personal property. Said procedures shall provide for the following:

(a) A brief statement to the inmate setting forth the basis for the seizure;

(b) Notice to the inmate of the right to respond in a reasonably simple and convenient manner, and to assert grounds, if any, why the seizure is claimed to be unwarranted;

(c) A suitable opportunity to meet and answer controverted evidence thought to warrant confiscation;

(d) A decision setting forth reasons, however brief.

PACKAGES

19. Within 90 days of entry of this partial judgment, respondents shall prepare and submit to the Court and counsel, for implementation upon approval by the Court, a set of regulations permitting inmates to receive packages from outside the MCC. Said regulations shall include specifications as to the volume, frequency and character of the packages inmates will be permitted to receive, and the inspection

procedures to be used in connection with receipt of such packages.

UNIFORMS

20(a). Sixty days after entry of this partial judgment:

(i) Respondents are enjoined from requiring inmates at the MCC to wear the jumpsuit uniforms presently in use at the MCC.

(ii) Pretrial detainees at the MCC shall be permitted to wear their own clothing unless they consent to wear the uniforms described in paragraph 20(a)(iv) below.

(iii) Sentenced inmates shall be permitted to wear their own clothing unless the respondents provide said inmates with the uniform described in paragraph 20(a)(iv) below; upon the issuance of said uniforms, sentenced inmates may be required to wear said uniforms rather than their own clothes. A sentenced inmate may wear the jumpsuits presently in use at the MCC only if said inmate volunteers to wear the jumpsuit.

(iv) Uniforms at the MCC shall consist of the following:

(A) Men: shirts and trousers; the respondents may, but are not required to, issue other conventional items;

(B) Women: dresses, or blouses with skirts or slacks; the respondents may, but are not required to, issue other conventional items.

(v) Uniforms issued by respondents shall reasonably fit the wearer.

(b) Inmates shall be permitted to wear their own undergarments or, if respondents choose, shall be provided with new ones.

(c) In connection with the implementation of paragraph 20(a) above, respondents may prescribe and implement reasonable rules and regulations regarding the amount and type of personal clothing that a pretrial detainee or sentenced inmate, if applicable, may possess at the MCC, and the procedures whereby and frequency with which said inmates may receive or exchange personal clothing items from outside the MCC.

(d) The requirements set forth herein are subject to reconsideration and modification by the Court upon due notice and hearing.

FOOD SERVICE

21. Within 30 days of entry of this partial judgment, respondents shall issue and enforce a new statement of regulations which require all employees, civilian or inmate, working in food preparation, storage, and service to wear hand and head coverings while handling food.

EXERCISE DURING CONFINEMENT IN ADMINISTRATIVE DETENTION

22. Inmates placed in administrative detention, either in their regular housing unit or in a special unit designated for administrative detention, shall

normally be provided, consistent with existing available resources and the security needs of the unit, with an opportunity for one hour of outdoor exercise per day. In the event that an inmate in administrative detention is not provided with the opportunity for one hour of outdoor exercise per day, the inmate shall be informed, in writing, by the Chief Correctional Officer, an Associate Warden or the Warden of the reasons for not being provided with that opportunity.

LOCK-IN ON UNIT 5-SOUTH

23. Respondents are hereby enjoined from the practice of locking inmates assigned to unit 5-South into the rooms in that unit without toilet facilities for administrative detention, disciplinary segregation, unit-wide emergencies or any other reason, except that an inmate who has become violent or presents a clear and present danger of violence or escape may be locked into one of those rooms for not more than 15 minutes pending transfer to another room with toilet facilities.

STAFF

24. MCC correctional officers and other staff at MCC are enjoined from entering the rooms, toilets and shower rooms used by inmates of the opposite sex unless the said correctional officer or staff member first knocks on the door or announces his or her presence and gives suitable warning to the inmate that

said officer or staff member is about to enter the area, except that said notice may be omitted: (a) in an emergency, or (b) during the hours of 11:00 P.M. to 6:30 A.M. when inmates are normally asleep.

PARTIAL SUMMARY JUDGMENT ORDER

25. This Court's partial summary judgment order dated January 19, 1977 is incorporated herein by reference.

PETITIONERS' CLAIMS THAT ARE DISMISSED

With respect to the following claims asserted by the petitioners in the amended complaint dated January 12, 1976, the amendments to the amended petition dated November 17, 1977, or at the trial of this action, judgment is hereby entered against the aforesaid petitioner class dismissing said claims with prejudice and on the merits:

26. All claims set forth in paragraph 6 of the amended petition, except as specifically provided above.

27. All claims set forth in paragraphs 7 through 18 of the amended petition, and as amended by paragraphs 10 and 11 of the amendments to the amended petition, except as specifically provided above.

28. All claims set forth in paragraphs 19 through 27 of the amended petition except as specifically provided above.

29. All claims set forth in paragraphs 46 through 54 of the amended petition except as specifically provided above.

30. All claims set forth in paragraphs 55 through 68 of the amended petition and as amended by paragraph 60 of the amendments to the amended petition, except as specifically provided above.

31. All claims set forth in paragraphs 69 through 75 of the amended petition.

32. All claims set forth in paragraphs 76 through 85 of the amended petition.

33. All claims set forth in paragraphs 86 through 98 of the amended petition except as specifically provided above.

34. All claims set forth in paragraphs 99 through 102 of the amended petition except as specifically provided above.

35. All claims set forth in paragraphs 103 through 105 of the amended petition except as specifically provided above.

36. All claims set forth in paragraphs 106 through 108 of the amended petition.

37. All claims of paragraph 109 of the amended petition except as specifically provided above.

38. All claims set forth in paragraphs 110 through 113 of the amended petition except as specifically provided above.

39. All claims set forth in paragraphs 114 through 117 of the amended petition except as specifically provided above.

40. All claims set forth in paragraphs 118 through 124 of the amended petition.

41. All claims set forth in paragraphs 125 through 128 of the amended petition except as specifically provided above.

42. All claims set forth in paragraphs 129 through 132 of the amended petition except as specifically provided above.

43. All claims set forth in paragraphs 133 through 138 of the amended petition.

44. All claims set forth in paragraphs 139 through 142 of the amended petition.

45. All claims set forth in paragraphs 143 and 144 of the amended petition except as specifically provided above.

46. All claims set forth in paragraph 145 of the amended petition.

47. All claims set forth in paragraphs 146 through 149 of the amended petition.

48. All claims set forth in paragraphs 150 through 154 of the amended petition except as specifically provided above.

49. All claims set forth in paragraphs 150(a) of the amendments to the amended petition.

STAY

50. (a) The following portions of this partial judgment are hereby stayed for an initial period of ten (10) days from the date of entry of this partial judgment.

(i) Paragraphs 1, 4, 9, and 20.

(b) Upon respondents' filing a notice of appeal from this partial judgment within the above-described ten (10) day period, the aforesaid stay shall be automatically extended and remain in effect until the Court of Appeals renders its decision on the appeal in this case.

(c) Notwithstanding the stay set forth in paragraphs 50(a) and 50(b) above, respondents shall begin to prepare the reports, statements, rules or regulations required by paragraphs 1, 2, 4, 19 and 20(c) above; respondents shall have those reports, statements, rules or regulations ready for submission to the Court and counsel within the time periods set forth in paragraphs 1, 2, 4, 19 and 20(c) above, respectively, except that respondents shall not be required to submit the reports, statements, rules or regulations under paragraphs 1, 4, and 20 to the Court or counsel during the pendency of the stay provided herein and until further order of this Court or the Court of Appeals.

Dated: New York, New York
Oct. 13, 1977

/s/ Marvin E. Frankel
MARVIN E. FRANKEL
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6000

UNITED STATES OF AMERICA ex rel. LOUIS WOLFISH, HELEN ROMERO, CHARMAINE ROBINSON, MARYANNE CALLAHAN, GERALDINE HARKER, FRANCIS WOODS, DANA DYNES, WILLIE S. MCCARTHA, ESTELLA FERNANDEZ, MARGARET RUSSELL, RUTH SMITH, CYNTHIA EDWARDS, BIRCHEL L. CARLSON, SHERMAN GREENE, MILDRED SKEETE, MARY JORDAN, DORRIS DORRS, CARMEN ESTRADA, JEREMIAH O'SULLIVAN, MAXIMA VIDAL ORTIZ, ANTHONY VICTORY, JANET FALLEY, GORDON HAGEN, GARRY LEE, LINDA SESSOMS, ET AL., PETITIONERS

—against—

THE HONORABLE EDWARD LEVI,
Attorney General of the United States;
NORMAN CARLSON, Director, U.S. Bureau
of Prisons; and
LARRY TAYLOR, Warden, Metropolitan
Correctional Center, et al., RESPONDENTS

ORDER

FRANKEL, D.J.

The petitioner class, consisting of all persons who are or will be confined at the New York Metropolitan Correctional Center ("MCC"), 150 Park Row, New York, New York, 10007, having moved this court for partial summary judgment on certain of the issues

in this case, and the respondents having opposed summary judgment on certain of those issues and having cross-moved for summary judgment in their favor on others of those issues, and the court having considered the affidavits, transcripts, exhibits, and memoranda submitted by both sides and having heard oral presentations by counsel for both sides and having toured the MCC, and having considered all of the other papers and proceedings heretofore had herein, and the court having issued an opinion dated January 5, 1977; it is hereby

ORDERED that respondents, their agents, employees, and successors, and all persons acting in concert with them be and they hereby are enjoined from confining any member of the petitioner class at MCC except under the following conditions:

1. SINGLE CELL OCCUPANCY

Within 60 days after the date of this order, respondents shall eliminate all instances in which more than one person is housed at the same time in any one of the 389 residential rooms at MCC (i.e., exclusive of the dormitory unit on 11 South); thereafter, respondents shall not house more than one person in any one of those rooms at the same time.

2. RECEIPT OF BOOKS, PERIODICALS AND OTHER READING MATERIAL

a. Regardless of the source, respondents shall deliver to petitioners any books, periodicals, or other

reading materials mailed or sent to petitioners or hand-delivered to an official at the institution designated by respondents to receive such materials.

b. Respondents may inspect such materials for contraband before delivering them to petitioners; provided that inspection shall be accomplished with the least possible damage to the reading material and that such damage shall be fully repaired, or repaired to the fullest extent possible, with maximum feasible speed unless contraband, duly and promptly determined to be contraband, has been detected therein.

3. RECEIPTS FOR THE SEIZURE OF ITEMS

Any petitioner from whom an item of property is seized shall be provided with a written receipt for such item; said receipt shall identify the petitioner; the item seized; the date, time, and location of the seizure; the prison official who effectuated the seizure; and the reason for the seizure.

4. MAIL

a. Respondents shall not read incoming mail from attorneys or courts in any circumstances, and may read incoming mail from persons other than attorneys or courts only upon a showing of good cause approved and determined in each instance in advance in writing by the Chief Correctional Supervisor, an Associate Warden, or the Warden, and then only in the presence of the addressee.

b. Petitioners may seal all outgoing mail before placing it in a mailbox in their housing unit; respondents may inspect outgoing mail by electronic or other devices to detect hidden objects, but without opening the letters; upon detecting enclosed objects, or upon substantial cause for believing there are hidden objects in the envelope, respondents may open outgoing mail, other than mail to attorneys or courts, and examine the contents for contraband; respondents may read such outgoing mail so opened only upon a showing of good cause approved in each instance in advance in writing by the Chief Correctional Supervisor, an Associate Warden, or the Warden, and then only in the presence of the petitioner-sender.

IT IS FURTHER ORDERED that so much of the amended petition as seeks an order enjoining respondents from opening and inspecting mail from persons other than petitioners' attorneys or the courts, except in the presence of the petitioner-addressee, and any incoming mail except upon a showing of good cause, is dismissed with prejudice; and that petitioners' motion for partial summary judgment and respondents' cross-motion for partial summary judgment are in all other respects denied.

Dated, New York, New York
January 19, 1977

MARVIN E. FRANKEL
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT

S.D. NEW YORK

No. 75 Civ. 6000

UNITED STATES OF AMERICA ex rel.
LOUIS WOLFISH et al., PETITIONERS

v.

EDWARD LEVI et al., RESPONDENTS

Sept. 15, 1977

As Amended Sept. 26, 1977

OPINION

FRANKEL, District Judge.

In the explosively growing field of law about prison conditions lately developed in the federal courts, this case has one relatively rare feature: it concerns conditions in one of our own, *federal* places of confinement. The institution in question is the Metropolitan Correctional Center (MCC) adjoining this courthouse. The action was brought for the MCC's involuntary occupants (both male and female) as a class, embracing the pre-trial detainees for whom the facility was primarily designed, sentenced prisoners either awaiting assignment to a prison facility or assigned here to serve their (usually relatively short) terms, prisoners here on writs to testify or to stand

trial, witnesses in protective custody, and persons incarcerated for contempt.[1] Initially brought and conducted largely or wholly by the first-named petitioner, who has since been assigned elsewhere, the case for petitioners was assigned by the court to the Federal Defender Services Unit of the Legal Aid Society, which has proceeded with a quality of resourceful and dauntless vigor for which the court records its appreciation.

The petitioners have lodged a long roster of complaints resting upon an array of constitutional and statutory theories. Some issues have been decided upon motions for summary judgment. Thus, upon affidavits recounting undisputed facts, supplemented by the court's physical views of the premises, the transformation of rooms designed for single occupancy into double rooms was held unlawful and enjoined. 428 F.Supp. 333 (Jan. 5, 1977). Along with that determination, the court invalidated (1) a rule allowing petitioners' receipt of literature directly from publishers and from substantially no other source, (2) a practice of seizing property from inmates without giving receipts for it, and (3) the opening of inmates' outgoing mail. Id. Those determinations were accompanied by denials of petitioners' complaints regarding inspection of non-legal mail.

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[1] The propriety of continuing the case as a class action was confirmed by an order dated December 23, 1975, in which the class was defined as "all persons detained in the Metropolitan Correctional Facility."

At earlier times, upon applications for interlocutory relief, the court issued preliminary injunctions relating to the MCC's telephone service and forbidding any change in visiting hours without notice to the court and petitioners.

Trial of the many questions still to be decided began on February 28 and extended, with some interruptions and truncated days, through March 30, 1977. In addition to the live testimony of inmates, attorneys, correctional personnel (including the Warden and Bureau of Prisons Director), and various experts, the court has considered deposition testimony, voluminous exhibits, and the observations made in two further visits to the MCC. These materials, as compounded and alchemized in post-trial memoranda and affidavits approaching a total of 1,000 pages, generate the findings and conclusions that follow.

In advance of enumerating what the court has decided, and why, it has seemed convenient to begin with a general description of the MCC, and then to sketch preliminarily the principles and restrictions (by no means fixed and certain) governing the involvement of federal judges in the conditions and management of federal prison facilities. Against these background observations, the facts and dispositions with respect to each subject of controversy will be the subject of our third, and lengthiest, chapter.

I.

The MCC, which opened on August 2, 1975, has an appearance, and results from a course of planning,

markedly divergent from the bestial traditions of the American jail.[2] However well or ill they succeeded, a question we must presently address, those who conceived and designed this institution strove to be humane. They undertook to plan not merely for security and efficiency, but for modest amenities that might rescue from the wretchedness of incarceration some remnants of privacy, self respect, and, even, dignity. The MCC, at least upon first sight, is markedly different from the familiar pattern of barred cages, gray corridors, and clanging gates comprising the standard image.

Two features of the institution have basic significance for its structural character and some of the major complaints lodged by petitioners. First, built in a congested part of a congested City, next to our court building, it is 12 stories tall and has no open ground around it for recreational or other uses. Second, the five floors of the building housing inmates are divided into "functional," or "modular," units reflecting a carefully conceived idea of how best to organize relatively complete programs within subdi-

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[2] American jails, which characteristically, if ironically, house minor offenders and presumptively innocent people awaiting trial under conditions far more wretched than those of the prisons, have generated shelves of depressing literature. See, e.g., K. Menninger, *The Crime of Punishment* (1966); B. Bagdikian, *The Shame of the Prisons* (1972); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F.Supp. 676 (D.Mass. 1971), aff'd, 494 F.2d 1196 (1st Cir.), cert. denied *sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 189 (1974); *Rhem* v. *Malcolm*, 371 F.Supp. 594 (S.D. N.Y.), aff'd, 507 F.2d 333 (2d Cir. 1974).

visions of the building rather than requiring or permitting aggregations of the population for such activities as meals and recreation. The modular unit, as its creator imagined it, would facilitate useful classifications of inmates (e.g., sentenced people, those awaiting trial, dangerous/nondangerous). Each functional unit, being self-contained, would include its own common area, eating place, some recreational facilities, and separate sleeping quarters. Since the total number within the unit would be relatively small, problems of mass traffic would be cut or eliminated. Long periods of lock-in time would become unnecessary. Inmates could circulate within the unit during much of the day, moving freely from the common area to the comparative privacy of a dormitory or the more nearly entire privacy of the single room, which was to be the most prevalent form of sleeping accommodation.

This design was implemented. As the MCC came to be constructed, almost every floor housing inmates has two modular units.[3] Each unit has from two to six "clusters" or corridors of rooms or dormitories radiating from a central common area. One of the units contains dormitories, designed by the planners to house ten inmates each. The remaining units con-

[3] The two exceptions are an honor unit, the only one on the second floor, and Unit 3, on the third floor. The honor unit houses the "cadre," sentenced inmates serving their terms at the MCC, who work throughout the institution and are rarely locked into their rooms. These inmates are housed in rooms originally intended as part of the infirmary. Unit 3 is the protective custody unit.

tain clusters of rooms, each designed for a single occupant, each originally equipped with its own key to be given to the inmate.[4] Except for a unit now housing female inmates, each of the rooms has a washbasin and toilet.

The common areas are carpeted, and other details are designed to supply some color and interest for the eye. These areas, except for the one in the protective custody unit, are two stories in height, with flights of stairs leading to the rooms or dormitories. Each common area has a color television set, couches, chairs, tables, telephones, mail boxes, exercise apparatus, one or more typewriters, laundry facilities, a water fountain, an education area, and pantries with microwave ovens. There is equipment for closed-circuit educational TV, said at the time of the court's last visit to be verging toward employment. There are staff offices within the units (other than the protective custody unit). Carrying out the functional design, meals are brought on carts to the units, having been pre-cooked and apportioned onto trays, and reheated in the microwave oven before being served and consumed within the unit.

[4] The word "design" is—or is readily capable of being made—ambiguous. As used herein, it means "intended" by the planners of the structure, not merely as an abstract idea, but in terms of concrete effectuation (and, often, public assurances to other agencies or branches of government). Thus, a room planned for single occupancy was built (and equipped) with a single bed, storage and movement space suitable for one, lighting and ventilating equipment similarly arranged, etc. See 428 F.Supp. at 335-340, where the conversion of these single rooms to doubles was held by this court to have been unlawful.

Avoiding the bar or cage motif, the designers and builders of the MCC arranged narrow, but unbarred, windows facing the outside world, made of a powerful ⅜-inch thick unbreakable polycarbonate plastic, which is colorless and transparent.[5] The windows are recessed some 14 inches from the building's face and are soundproof.

Since the units are designed and used to accommodate nearly all the regular aspects of life in confinement, there is little or no reason in respondents' view, or opportunity, for an inmate's departure from the confines of the unit during the days and nights of his or her stay. Many inmates actually stay within their units continuously for long stretches of days or weeks. There is no gymnasium, chapel, commissary, or industrial work place. There is a rooftop recreation area equipped with an abbreviated basketball court, and for paddleball, handball, or open-air spectatorship. The area is surrounded by a wall 20 feet high and topped by a mesh of stainless steel wires welded to a steel gridwork. The inmates, proceeding by units, are allowed about an hour a day in this rooftop area, the desirability of which varies, of course, with weather conditions, and they vary widely in their uses of the opportunity. For the overwhelming majority of inmates, these excursions, the sick call, attorney visits, and court appearances are the only times they leave their units.

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[5] As a result of an escape attempt, bars have been placed on some of the windows, and steel sheathing has been placed on the inside of certain rooms with exterior walls.

Other aspects of the functional-unit plan—touching, *inter alia*, visiting, religious activities, and library facilities—are best discussed in connection with specific issues to be decided.

II.

General propositions may not decide, but they define some useful perimeters for, concrete issues like those the petitioners have raised. In any case, the court has found it convenient to take some rough bearings before proceeding to the asserted grievances one by one.

We work in a new, but already substantial, field of law elaborated mostly by federal courts responding to demands of *state* prisoners for rights under the Federal Constitution and federal laws said to be offended by their treatment in state prisons. A host of cases have marked by now an array of rights to minimal decency in jails and prisons—some rights of expression and religious observance; rights to moderately civilized living quarters, food, and medical care; rights to escape punishment either barbaric in character or arbitrarily imposed; rights even to a measure of privacy and personal integrity, among others. Without exhausting them here, the federal charter of prisoners rights has featured prominently the First, Eighth, and Fourteenth Amendments, commonly marshalled against state defendants under the aegis of 42 U.S.C. § 1983.

There is little if any quarrel in the scholarly briefs before us that the federal rights given to state prisoners are not greater than those of federal pri-

soners. A question still surprisingly open is whether a federal court, confronted by demands for fair treatment with "its own" inmates, may not in such a case shoulder greater responsibilities or, to put it less demurely, exercise greater powers. We send them there, after all. Bernard Shaw was probably right for his time when he said:

> "Judges spend their lives in consigning their fellow creatures to prison; and when some whisper reaches them that prisons are horribly cruel and destructive places, and that no creature fit to live should be sent there, they only remark calmly that prisons are not meant to be comfortable; which is no doubt the consideration that reconciled Pontius Pilate to the practice of crucifixion."[6]

But that is no longer the position when state prisoners come to federal court. It may outrun precedent to say prisoners are "wards of the court."[7] Still, the notion that the judges may ignore people after they are confined is no longer valid.[8] And it may be uniquely un-

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[6] "The Crime of Imprisonment," preface to S.&B. Webb, *English Prisons under Local Government* (1922), quoted in Note, *Beyond the Ken of the Courts*, 72 Yale L.J. 506, 558 (1963).

[7] See Singer, *Prisoners as Wards of the Courts—A Nonconstitutional Path to Assure Correctional Reform by the Courts*, 41 U.Cinn.L.Rev. 769 (1972).

[8] This may be one of several subjects on which we could learn from foreign counterparts. Judges in France, West Germany, and Italy, perhaps elsewhere, are charged with supervision over conditions of confinement, claims of maltreatment, aspects of parole, and related matters of penal administration.

acceptable for federal judges dealing with federal prisoners after all that has happened lately to state prisons in the federal courts. As the point has been put negatively, "where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Procunier* v. *Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974). It is at least implicit that our duties are less constricted with respect to federal prisoners.

Beyond such general propositions, there are pointed and specific reasons justifying closer scrutiny of federal prison conditions by federal judges. Without reaching questions of constitutional law, we find in the statute books a matrix of federal law in which our Bureau of Prisons functions. These statutes extend comprehensive *powers* of management, control, and supervision over federal prisons and prisoners, see 18 U.S.C. §§ 4001(b), 4042, 4081, and 4082, and the powers are given to administrative officials, not judges. At the same time, by no means uniquely, the powers import *duties*, see 18 U.S.C. §§ 4042 and 4081, and these obligations (to take care, protect, classify, provide suitable quarters, and instruct) are not misconceived or distorted if we describe them as intended to "benefit" those locked up under federal authority. It is no long step from that to infer that some rights —at least against arbitrary, capricious, or unauthorized treatment—accrue to the prisoners for whose management the statutes were written. Cf. *J. I. Case*

v. *Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964).

Further grounds for thinking the federal judicial power (and responsibility) broader for federal than state prisons may be found in the Administrative Procedure Act. When state officials, judicial or other, chafe against federal intrusions, their own provisions for reviewing administrative action offer wide avenues for recapturing leadership and control in their own domains.[9] It was never decreed, after all, that the bare floor of federal constitutional prohibitions must become for the States a ceiling above which humane and creative ordering, even for prisoners, should not be conceived.[10]

By a parity of reasoning, the *statutory* powers of the federal courts to draw lines against arbitrariness, caprice, and irrationality would seem to be available in appropriate cases where actions or practices of the Bureau of Prisons are called into question.[11] The subject seems still to be surprisingly open. There is some spare and divergent authority on the applicability of the APA to the Bureau of Prisons. Compare *Ramer* v. *Saxbe*, 173 U.SApp.D.C. 83, 85, 522 F.2d 695, 697 (1975), with *Clardy* v. *Levi*, 545 F.2d 1241 (9th Cir. 1976); see also *Mercer* v. *United*

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[9] See Comment, *A Statutory Right to Treatment for Prisoners*, 50 Nebraska L.Rev. 543 (1971).

[10] Cf. Paulsen, *State Constitutions, State Courts, and First Amendment Freedoms*, 4 Vanderbilt L.Rev. 620 (1951).

[11] Cf. Spaeth, *The Court's Responsibility for Prison Reform*, 16 Villanova L.Rev. 1031, 1041-46 (1971).

States Medical Center for Federal Prisoners, 312 F.Supp. 1077, 1079-80 (W.D.Mo. 1970). Some courts have reviewed actions of prison officials under an "arbitrary and capricious" or "abuse of discretion" standard without specifically indicating the derivation of the standard. See, e.g., *Marchesani* v. *McCune*, 531 F.2d 459, 462 (10th Cir.), cert. denied, 429 U.S. 846, 97 S.Ct. 127, 50 L.Ed.2d 117 (1976); *Royal* v. *Clark*, 447 F.2d 501, 502 (5th Cir. 1971). Without presuming to synthesize definitively the wisps of uncertain doctrine, and without considering "applicability" as a universal concept (since the APA may, of course, apply in some respects and not in others), but having firmly in mind the basic premise that "judicial review * * * will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress," *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967), this court has concluded that at least some actions of the Bureau of Prisons are neither "committed to agency discretion" nor shielded by any "statutes [which] preclude judicial review," 5 U.S.C. § 701, so that there is some scope for judicial duty and authority under the APA.

On the latter aspect, little need be said. There simply is no statute precluding judicial review.

The prior criterion—whether the subject is "committed to agency discretion"—is a harder topic. It was customary until lately for the judges to stay strictly away from issues as to prison administration. See *Procunier* v. *Martinez*, 416 U.S. 396, 404, 94

S.Ct. 1800, 40 L.Ed.2d 224 (1974). That stance has changed radically in the last decade or so. It remains true that the judges are not to take over the running of the prisons, being notably "ill equipped" as well as unauthorized to do that. Id. at 405, 94 S.Ct. 1800; and see *Meachum* v. *Fano*, 427 U.S. 215, 228-229, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Still, the notion of prison administrators as absolute sovereigns is quite dead. And that is as it should be. There are powerful reasons, after all, why the judges ought to be prepared to give at least some attention to complaints against the conditions of confinement ordered by judges. There is commonly as a practical matter no other forum in which prisoners can be heard. They have no clout with legislators, other elected officials, or anyone in the responsible agency. See *Davis Associates* v. *Sec. of HUD*, 498 F.2d 385, 390 (1st Cir. 1974). Despite the traditional reverence we have paid to the expertise of jail keepers, there are, as the present record reveals, many pertinent matters on which their knowledge seems no more profound than that of judges. And experience has taught us now that judicial intervention may be meaningful, effective, and beneficial, without also being unnecessarily intrusive. There are, in sum, at least several factors of consequence rendering it unacceptable to hold across the board that prison officials' actions, policies, and procedures are unreviewably committed to their discretion.[12]

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[12] See generally, Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv.L. Rev. 367 (1968).

Whatever may come to be the scope of statutory review of actions by prison officials, there are clear grounds of familiar judicial policy favoring that mode over constitutional adjudications. To be sure, this is an area, like may others, where conceptions of due process are "not graven in stone." *Wolff* v. *McDonnell*, 418 U.S. 539, 572, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Times and circumstances change; "a reasonable accommodation" at some point in constitutional terms may come at some later time to be unreasonable and unacceptable. Id. So there is flexibility in any event. But that desired quality and maximum participation by all those charged with governing, is more readily achieved when sound judicial decisions are possible without resort to the Constitution. Legislative and executive responses—especially on matters like prisons, where the primary authority and concern are indeed for legislative and executive officials, *Procunier* v. *Martinez*, *supra*, 416 U.S. at 404-405, 94 S.Ct. 1800; see also *Meachum* v. *Fano*, *supra*, 427 U.S. at 2288-29, 96 S.Ct. 2532—are more easily given, and may be paid more entire deference, when the adjustments and balancing of interests are accomplished in terms less portentous that the Constitution's. Upon premises such as these, this court has undertaken, with respect to each of the several issues, to consider possible non-constitutional grounds as well as (in fact, prior to) the constitutional theories mainly debated in the briefs.

It may be, of course, that the difference becomes more subtle and refined than is useful. What is "ar-

bitrary," "capricious," "irrational," or "unreasonable," may at once, and indistinguishably, violate constitutional as well as statutory rights.[13] It may be enough for most purposes, without too much refinement, to accept as a usual test the Government's shortly stated standard of "whether the institution is providing reasonable and decent conditions of confinement * * *."[14] We are commissioned, however, to be explicit and candid, and to conform to the law. The effort has been, therefore, to identify the grounds of decision with a measure of specificity.

Whatever the grounds, whether constitutional or statutory, the case has been approached with three basic principles in view. These bear restatement:

First, deference is owed to the primary authority and expertise of those charged with building and running the prisons. Their judgments, unless made arbitrarily or in conflict with particular rights given by Constitution or statute, are entitled to respect and probable finality. See, e.g., *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, —— U.S. ——, ——, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977).

Second, it remains nevertheless a powerful principle that a prisoner retains "all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation

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[13] But see Linde, *Due Process in Lawmaking*, 55 Nebraska L.Rev. 197, 225-235 (1976).

[14] Respondents' Post-Trial Memorandum 56.

and that of other prisoners, it does not deny his right to personal security against unlawful invasions." *Coffin* v. *Reichard*, 143 F.2d 443, 445 (6th Cir. 1944). Defining the rights thus retained—and balancing them against problems of security, good order, and the supposed purposes of punishment—is now an accepted, if not uniformly simple, task of the judiciary.

Third, pre-trial detainees, a central group in the petitioner class, are not subject to the substantial powers of prison officials that attend their function of administering punishment. For these detainees, presumed to be innocent and held only to ensure their presence at trial, "any deprivation or restriction of * * * rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity." *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975); see also *Rhem* v. *Malcolm*, 507 F.2d 333, 336-37 (2d Cir. 1974).

With these thoughts in view, we proceed to the list of issues and their determination.

III.

A. MODULAR CONFINEMENT

As described earlier, the MCC is organized into self-contained living units. With the exception of medical services and recreation on the rooftop area, the institution provides all services to the inmates on the living unit.

This "modular unit" is an interesting, well-intended, in some ways beneficial, but in some ways uniquely restrictive and hotly contested mode of confinement. The combination of common areas with radiating clusters of sleeping quarters is at first—and, indeed, steadily—more pleasing to the eye than the traditional corridors of cell blocks or dormitories. On the other hand, the narrow perimeter measurements of the unit as a whole soon become oppressive and close when, as is usually the case, they bound the inmate's world for 23 or 24 hours of the day. There is no room to run or jog or even walk very much. There is no place to go outside the unit—or, at least, no place where it is permissible to go.

In this important respect, the units contrast sharply with more familiar styles of prison architecture. In many other jails, and in many secure prison facilities for sentenced inmates, the people in confinement can move freely over relatively long distances and in relatively large spaces. Within the perimeter walls of a Danbury or a Lewisburg for example, there are hundreds of yards of walking and running distance both in recreational areas and in the corridors or open spaces leading from one to another of the places to which prisoners are expected and permitted to go. Movements of this nature are more or less random within the prescribed time spans, so that there is a modest but noticeable measure of choice and autonomy. During designated periods, confined people may proceed to work places, dining halls, commissaries, libraries, auditoriums, chapels, school rooms, gym-

nasiums, playing fields, and other varied destinations. Many of these goings and comings are matters of individual choice. They may be accomplished individually or in random, self-selected groups rather than formations proceeding under guard.

Analyzing the far more straitened confines of the MCC, experts for petitioners condemned it as a harsh and unacceptable form of "maximum security" imprisonment. Respondents' experts, who described as "maximum security" institutions those where inmates are locked into their rooms for 23 hours a day, or where inmates are separated from the guards by bars, considered MCC to be "medium custody." There is no dispute, however, that movement is more restricted at the MCC than in most other federal facilities. Nor are we likely to proceed far in resolving specific issues by conjuring with categories like "maximum" and "medium."

A corollary of the modular living system is the lack of central facilities which inmates may visit to engage in certain activities—an indoor gymnasium, chapel, law library, general library, or commissary. Also, keeping inmates confined to their living units restricts employment and educational program opportunities. Petitioners request that the court order sweeping changes in the modular living system, including directions to develop central facilities such as those listed.

In studying the several issues thus raised, the court has confronted two that have pervasive significance:

the classification of inmates and the length of time people are confined at the MCC. Because their resolution affects a train of other matters, these problems are treated first, followed by others more or less in the order of the briefs.

1. *Classification.*—A relatively small number of MCC inmates are free of the most restrictive aspects of modular confinement. These are cadre personnel, often called "redstripers" for an identification symbol they wear, who are free to pass through the doors separating units and move about through the areas within the outside perimeter of the Center. For most of the others, however, the situation of substantially total confinement is maintained without any attempted distinctions among the obvious categories into which the inmates fall. This virtually complete failure to classify is defended on the ground that people stay for only brief periods in the MCC and that effective determinations as to their characteristics are thus rendered difficult or impossible. Further, respondents point out, they do not have pre-sentence reports on pre-trial detainees and thus lack a ready source of information on which to base classifications. It may be as difficult as respondents say to classify MCC inmates, though this is not established to the court's satisfaction. The claim of impossibility is totally untenable.

The failure to distinguish among inmates leads to a grossly excessive use of substantially total confinement when some lesser level of restriction would be entirely feasible in a great many cases. *Rhem* v.

Malcolm, 507 F.2d 333, 338 (2d Cir. 1974), aff'g 371 F.Supp. 594 (S.D.N.Y. 1974). While the court has been asked to order sweeping changes in the physical arrangements for modular confinement, it seems imprudent to go so far. Instead, the court will direct a reasonable system of classification, allowing the respondents themselves, in the exercise of their main responsibilities, to proceed from that to a more acceptable level of confinement for at least a large number of those held in the MCC.

There is no rational excuse for holding elderly, lame, sickly, and otherwise incapacitated persons as tightly as may seem necessary for those more agile and disposed to take measures. Similarly, it is unacceptable to lump without discrimination the embezzler, the bank robber, the mail thief, the narcotics dealer, and every miscellaneous category of alleged criminal, and treat all alike for purposes of security. Not least of all, it is impermissible to treat indistinguishably those who are presumably innocent and awaiting trial, and those who have been convicted and are serving sentences.

The failure to classify, with its consequences of excessive and indiscriminate confinement, is rationally unsupportable, and correctable for that reason alone. It is also, as the cases show, a denial of due process. Building upon the common sense of the situation, as vindicated by ample precedents and nowhere refuted by respondents' submissions, the court will order, first, that respondents must separate pretrial

detainees from sentenced inmates. *Barnes* v. *Gov't of the Virgin Islands*, 415 F.Supp. 1218, 1235 (D.V.I. 1976); *Holland* v. *Donelan*, Civil Action No. 71-1442 (E.D.La. 1973); *Hamilton* v. *Landrieu*, 351 F.Supp. 549, 552 (E.D.La. 1972); *Taylor* v. *Sterrett*, 344 F. Supp. 411, 423 (N.D.Tex. 1972), aff'd in part, rev'd in part, 499 F.2d 367 (5th Cir. 1974), cert. denied, 420 U.S. 983, 95 S.Ct. 1414, 43 L.Ed.2d 665, reh. denied, 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed.2d 463 (1975); *Brenneman* v. *Madigan*, 343 F.Supp. 128, 138-140 (N.D.Cal. 1972); *Hamilton* v. *Love*, 328 F. Supp. 1182, 1191 (E.D.Ark. 1971); *Jones* v. *Wittenberg*, 330 F.Supp. 707, 717 (N.D.Ohio 1971), aff'd *sub. nom. Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972).

Secondly, respondents must separately classify persons who pose physical dangers, who are thought on plausible grounds to pose risks of violence, of escape, or attempts to escape. *Rhem* v. *Malcolm*, 371 F.Supp. 594, 624-25 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974). See also *Obadele* v. *McAdory*, Civ. No. 72J-103 (N) (S.D.Miss. June 19, 1973); *Taylor* v. *Sterrett*, *supra*, 344 F.Supp. at 423; *Brenneman* v. *Madigan*, *supra*, 343 F.Supp. at 140. This is not only appropriate for the general security of the institution; it is also a means of implementing the rights of the inmates themselves to be protected from physical and mental injury. *Gates* v. *Collier*, 501 F.2d 1291, 1308-09 (5th Cir. 1974); *Martinez Rodriguez* v. *Jimenez*, 409 F.Supp. 582, 594 (D.P.R. 1976), aff'd,

551 F.2d 877 (1st Cir. 1977); *Pugh* v. *Locke*, 406 F. Supp. 318, 329, 333 (M.D.Ala. 1976); *Alberti* v. *Sheriff of Harris County Texas*, 406 F.Supp. 649, 669 (S.D.Tex. 1975); *Rhem* v. *Malcolm*, *supra*, 371 F.Supp. at 628-29; *Incarcerated Men of Allen County* v. *Fair*, Civil No. C 72-188 (N.D.Ohio, May 19, 1973). As the court said in the last of these cases:

> "[A] jail should be a very safe place to be. Prisoners have a right to safety, and failure to provide maximum possible safety because of administrative or mechanical problems cannot be justified." Opinion at 3.

It is unacceptable, for example, to house in dormitories inmates who, on reasonable grounds, must be deemed to present threats to those with whom they live.[15]

When the foregoing measures of classification have been instituted, perhaps along with others that respondents are, of course, free to evolve, it should be feasible to relax the existing restrictions on movement within the outer borders (which are highly secure) of the MCC. As has been noted, the court is unable and unwilling to prescribe such further measures of relief at this time. It is to be hoped that respondents will deal creatively and sufficiently with the problem.

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[15] Petitioners demand that they be placed in dormitories only with their consent. In view of the ruling now on classification and the determination below as to length of stay, the court denies this further form of proposed relief. There is no need to decide whether a total prohibition against dormitory living might in some circumstances be required.

The issues that may yet arise on this score are postponed for another day.

2. *Length of confinement.*—It has become clear—it could perhaps have been said *a priori*—that disputed conditions which may be reasonably tolerable for relatively short terms become progressively more cruel or injurious with the lapse of time. The point is underscored by respondents. Throughout their arguments—on exercise, recreation, work, and other aspects of MCC life—they emphasize that this is a short-term institution. The argument is significant. And it has significant implications.

Respondents stress that over 50% of the inmates spend less than 30 days in the MCC and 73% less than 60 days. Petitioners stress the still substantial number comprising the other 25%. Since the law values each of us one at a time, this large group of human beings must be reckoned with. So it is important to deal with the evidence that 7.5% are confined in the MCC for 60-90 days; 4.5% for three to four months; 8% for four to six months; and so on, with some inmates, mostly those in protective custody, residing at MCC for as long as 620 days.[16]

The total record on the pertinent subjects demonstrates in the end that the modular arrangements in

[16] These figures (rounded off) are taken from a survey done by respondents. Petitioners argue that it underrepresents the number of inmates who stay for long periods of time. Petitioners would also add successive sojourns at the MCC to determine an inmate's length of stay. In view of the court's ruling, it is unnecessary to resolve the argument in precise detail.

the MCC will do on the whole for as long as 60 days, but not for longer. This is obviously not a figure computed with calipers. It is, however, a considered judgment based on the totality of the relevant circumstances—such things as the lack of a gymnasium, the lack of outdoor space for walking and running, the absence of a chapel, auditorium, library, separate work places, separate school and classrooms, and other facilities. Appraising these aspects in light of the testimony and direct observation, the court has been led to conclude that the MCC grows unacceptably cramped and oppressive for most healthy adults after a sojourn of two months. Some, of course, may find it tolerable, even preferable, for longer. Some may suffer—to an extent that may come later to be separately adjudicated—after much shorter times. But the record is preponderantly supportive of the view that the majority of inmates may fairly be subjected to the modular arrangement for 60 days, and that they are likely thereafter to suffer unduly in terms of close, constricting, tense, and frustrating confinement. See *Rhem* v. *Malcolm*, 432 F.Supp. 769, 789 (S.D.N.Y. 1977), and cases there cited.

Upon these findings, and having in mind the purpose and stated rationale of the Center and its design, the court concludes that confinement for over 60 days, except for volunteers, should not be tolerated. It is an arbitrary and capricious deviation from the intended and promised use of the facility. It is, if the point need be reached, a denial of due process. There

is no reasonable or rational basis for perverting a facility built and justified for brief periods of detention into a long-term prison. The court will, therefore, order that no inmate be kept in the MCC for a period longer than 60 days without his or her consent. As soon as it is known that an inmate's stay will exceed 60 days (a prospect that may be obvious from the outset or only become obvious after the passage of some time), that inmate will be informed of his or her right to be transferred to another institution. The right may be waived. Inmates may well prefer the MCC, for its proximity to home or other advantages, despite its defects. See *Rhem* v. *Malcolm*, *supra*, 432 F.Supp. at 789. But the right of transfer, along with the privilege of waiver, must be made known promptly in clear and non-coercive terms.

As will appear further, several of the rulings on other issues rest in part on this premise of relatively short stays in the MCC.

3. *Physical Exercise.*—There is no indoor gymnasium at the MCC. Physical exercise is available one hour each day on the rooftop area, weather permitting. There are weight machines, exercise bicycles, dip bars, jogging machines, wall pulleys, and medicine balls variously available in the multipurpose areas of the units, though not all of these things are on all units.

Petitioners challenge respondents' assertion that inmates have access to the rooftop daily. They point to the vagaries of weather in New York City. They

complain further that the hours assigned to each unit frequently coincide with that unit's visting hours; that the elevator is at times inadequate to transport expeditiously all inmates who wish to use the roof; that the guards do not make enough of an effort to let inmates know when the roof is open. Finally, petitioners point out that on several occasions over the past year, roof usage has been cancelled because of staff shortages.

The court finds, however, that the rooftop area is effectively available to the inmates for one hour per day at almost all times when the weather leaves it usable. The assigned hours are posted, and inmates can arrange to be ready for the assigned periods. Coordination with visits is perfectly feasible; respondents must deal, like everyone, with the limits of the day. On our tours, the roof area was well populated by inmates engaged in a variety of activities.

For those days when the weather does not permit outdoor activity, there is sufficient apparatus on the units to provide exercise. Although the use of this equipment sometimes results in noise that is less than ideal for TV listeners, the annoyance is modest and manageable with minimal effort by the inmates themselves to accommodate each other's needs.

A gymnasium, originally part of the MCC design, would be highly desirable. If the court were permitting involuntary sojourns of over 60 days, some facility of that nature might be claimed more effectively to be a requirement enforceable under the

Constitution or relevant statutes. But the enforcement of the original purpose to use the MCC only for short terms obviates that possibility. The court concludes that the provisions for physical exercise, in the setting of this decision as a whole, are sufficient.

4. *Religious activities and observances.*—The MCC provides religious services for Catholics, Protestants, Jews, Muslims, and Christian Scientists. There is, however, no central chapel. Religious services are led by clergy of the various faiths who make the rounds of the institution. Because the inmates may not leave their units, the clergy must divide their time among them and are unable to provide very extensive services or counseling. Several of them have offices in the MCC, but the inmates are not allowed to leave their units to visit them.

The modular restrictions result in a series of complaints. Jewish inmates, scattered among the units, are often unable to assemble a *minyan* (ten adult males) required for organized worship. A Muslim inmate complained that he did not participate in services because the Imam was of a sect different from his. Protestant and Catholic inmates protested the brevity of the time their clergymen have for them. More broadly, petitioners urge that respondents be required to "provide an adequately equipped chapel at the MCC to which petitioners may go for religious services;" additionally, that inmates should be allowed to visit the clergymen's offices; and that respondents should provide "sufficient numbers of adequate and

qualified clergy of the same major faiths as petitioners."

It is obvious that conditions for religious observance at the MCC are not ideal. It would be preferable were there a chapel or other arrangements for inmates of the same faith to congregate. It is to be hoped, moreover, when classification procedures begin and overcrowding is mitigated, that respondents will find it workable to allow assembly of people from the various units for more effective and less cursory services. But whether or not that hope is realized, the court finds no grounds for ordering any of the relief thus far discussed under this heading. Again, for the short terms hereafter to be the rule, the deprivations must be tolerated, as they are in other exigencies both civilian and military, on land and at sea, that occur and recur in our community's modes of existence.

In one respect, however, respondents are shown to be paying less respect than the Constitution commands to the religious needs of MCC inmates. Muslim observers, like religious Jews, must eschew pork. Jewish inmates obedient to this requirement are given kosher meals since our Circuit ordered support of this dietary restriction. *Kahane* v. *Carlson*, 527 F.2d 492 (2d Cir. 1975). The simplest, if not a compulsory, expedient would be to give the same meals to observant Muslims. Instead, respondents have profesesd to prefer to the latter an arrangement in which pork is deleted from the Muslim meal tray and an extra helping of potatoes or some other vege-

table is substituted. The arrangement is a failure. The substitution is wrong in nutritional principle; it fails to supply comparable nourishment. Moreover, even this inadequate arrangement is often neglected, and the observant Muslim is made simply to do without the meat portion or any replacement of any kind.

In this setting, the discrimination between Muslims and Jews, certainly not sought by either group, becomes a wrong to be remedied. Respondents have suggested no reason whatever for allowing it to continue. "In a case where a [practice] has been opposed on grounds as substantial as those presented here, the [agency] has the burden of offering *some* reasoned explanation." *Assoc. Indus. of N.Y.S., Inc.* v. *United States Dept. of Labor*, 487 F.2d 342, 354 (2d Cir. 1973). Respondents make no pretense of meeting this minimal test.

The court will order, therefore, that observant Muslims be served pork-free meals the same as those given to observant Jews, or allowed in substantially identical fashion to satisfy both their nutritional and their religious entitlements. The court leaves open to this extent the exact mode of compliance. See *Kahane* v. *Carlson*, *supra*, at 496. The critical point of the decree is that the rights be respected and that the existing course of arbitrary and unjustified discrimination be ended.

5. *Law Library.*—The MCC maintains a law library that functions primarily as a lending library. Only members of the cadre are permitted to visit the library. All other inmates must request books as

they need them, giving specific citations. Request slips are placed in envelopes on bulletin boards of each unit. The slips are picked up daily, Monday through Friday, and, within a day or two, the books are sent to the inmates. Three books may be requested at a time; they may be retained for a maximum of three days, but the time limit is often relaxed.

The librarian, a disbarred attorney serving a sentence at the time of our trial, is prohibited from engaging in any research. While this restriction is sometimes disregarded, the librarian never functions effectively as a legal researcher on more than trivial questions.

A list of library materials and rules is provided to inmates. The list was found, however, to be seriously incomplete. A considerable amount of material actually in the library is not on the list, an omission that is specifically hurtful in an arrangement that denies library users access to the shelves and the physical collections. This lack of access is the most serious and decisive respect in which the library facility must be deemed inadequate. Writing for the small and selected readership of the Federal Supplement, the court need not labor the point that effective legal research is impossible where it must be attempted at a remote distance from the volumes, with hopeful stabs at three books at a time spaced over intervals of two days or so. While petitioners also complain of other things, including the sufficiency of the collection, this problem of non-access presents

an overriding concern in the circumstances of the case before us.

Drawing a long bow, as always, petitioners demand that there be "a fully equipped up-to-date law library" with access at all times other than hours of lock-in. They contend also that the prohibition against possession of personal typewriters impairs efforts at self-representation; that the institution must provide typewriters for those who need but do not have them; and that facilities for duplicating papers are not, but should be, available to them.

The basic propositions from which the course of decision may proceed are these:

> *First*, all of the inmates must have "adequate, effective, and meaningful" means of access to the courts. *Bounds* v. *Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).
>
> *Second*, all of them, if they are so minded, may represent themselves. *Faretta* v. *California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Price* v. *Johnston*, 334 U.S. 266, 284-85, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948); *Adams* v. *U.S. ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L. Ed. 268 (1942).

When we apply these principles to the case at hand, it becomes evident that a number far smaller than the total MCC population is meaningfully affected by the library issue. The inmates awaiting trial, the primary class for which the facility was built, are overwhelmingly represented by counsel. For them, the complaints about the library are not significant.

Most prisoners here on writs and most of those serving the characteristically short sentences involved when the MCC is made the place of confinement are not engaged in *pro se* litigation.

Finally, the problem for all should be alleviated by the limitation to 60 days of most sojourns at the MCC. There remains, nevertheless, the small number exercising their right to represent themselves. For these, as has been noted, the existing long-distance, slow-moving, lending library system now in effect must be replaced. Contrary to respondents' contentions, this conclusion has support in precedent as well as in realities familiar to our profession. E.g., *Nadeau* v. *Helgemoe*, 423 F.Supp. 1250, 1272-73 (D.N. H. 1976); *Kirby* v. *Blackledge*, 530 F.2d 583, 586 (4th Cir. 1976). Inmates entitled to a library facility have a right to physical access to the shelves during a reasonable period of each day.

The implementation of this right should appropriately be left in the first instance for discretionary selection among possible options by the prison authorities. The highrise urban institution presents both opportunities and difficulties. The MCC is a short walk or ride from some of the most ample law libraries in the country. The building itself, including the existing law library, seems cramped for work space as well as book shelves. If meaningful research is to be done there, the MCC library will need more room and a more ample collection of books than it now possesses. Balancing the several problems of logistics and finance, respondents may conclude that transporting the relative few who genuinely need

this service makes more sense than contriving the expansions of the MCC library that would be necessary to meet minimum standards. Other possibilities exist: for example, respondents may wish to consider, in a City filled with eager law students, some arrangement under which inmates might be able (if they chose) to have the assistance of such students, volunteer lawyers, or others rather than enjoying the debatable right to wander freely, but perhaps blindly, among law library stacks. See *Stevenson* v. *Reed*, 391 F.Supp. 1375, 1379 (N.D.Miss. 1975), aff'd, 530 F.2d 1207 (5th Cir. 1976).

Within 90 days from the date of the decree herein respondents will report to the petitioners and the court their chosen mode of compliance with the court's direction that inmates with need therefore be given physical access for reasonable periods to adequate law library facilities. If respondents' determinations are disputed, counsel for petitioners will have 15 days in which to bring on objections and counter-proposals for the court's consideration. If respondents choose to comply by improving the MCC library itself, they must complete and expand its collection.[17] The open-

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[17] There is a stipulation, with some evident inaccuracies, as to what the library now contains. Without reproducing that list, the court will require respondents' report of compliance to contain a re-checked and accurate account of what is now on hand plus volumes to be added. As to the latter, in addition to the books now in the library, the decree will require that the Federal 2d and Federal Supplement series be extended back to 1950; that missing volumes in the several series now

ended handling of this subject at this stage is meant as an invitation to collaborative and imaginative management by respondents themselves. The court will be receptive in this light to proposed elaborations or modifications within the broad terms of what is held to be compulsory under the law.

There remain questions concerning typing and duplicating needs for legal submissions to the courts. The institution supplies one typewriter for each unit; petitioners say this is not enough and that there must be "an adequate supply of typewriters on the housing floors for use by petitioners in the prepration of legal materials."[18] The vagueness of the demand reflects the lack of solid foundation for the claim. The provision of more typewriters would be desirable. Perhaps the Bureau will acquire them in some future budget. But there is no ground for ordering more by court decree. *Eisenstadt* v. *Britton*, 478 F.2d 855 (5th Cir. 1973); *Stubblefield* v. *Henderson*, 475 F.2d 25 (5th Cir. 1973).

On the other hand, respondents' prohibtion against inmates' acquisition or possession of their own typewriters is, on this record, arbitrary and capricious. As is true of other restrictions respondents have im-

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stocked be replaced; that the Modern Federal Practice Digest be completed and the Federal Practice Digest Second be added. Petitioners would add, *inter alia*, various items of state law. In New York City, respondents should be able to satisfy this demand by including in their compliance proposals some lending arrangements with nearby libraries or some means of giving inmates access to those libraries.

[18] Petitioners' Post-Trial Memorandum 341.

posed upon personal possessions, this one is supported by no suggestion of sufficient or persuasive reasons. The Constitution may not confer a right to have a typewriter as an incident to the right of access to the courts. *Tarlton* v. *Henderson*, 467 F.2d 200 (5th Cir. 1972). But it is clear that a typewriter is a valuable implement for this purpose; that typed papers may leap more vividly than handwritten ones to the watery judicial eye; and that a barrier against this kind of support for cherished interests ought to have solid justification in reason and experience. Lacking any such support, respondents' prohibition against typewriters should and will be enjoined.

Finally, as to duplication of papers, the court finds petitioners' complaint unsupported by the evidence and dismisses this aspect of it.

6. *General Library.*—The MCC has a central lending library from which inmates may order books which are shown on a list available in each unit. Additionally, racks of paperback books are placed in each unit. The library is stocked primarily from donations. Every four to six weeks, the institution receives as donations from drug store book racks between 1500 and 4000 paperbacks that have been stripped of their covers, and these are divided among the units. Magazines are collected by the Education Coordinator from the Post Office's dead letter office and divided among the units.

Petitioners seek, but the court will not grant, an order requiring a central library to which they may have physical access, as is their position regarding

the law library. Since the court enjoined enforcement of respondents' "publishers only" rule, 428 F. Supp. at 340-41, inmates may receive reading matter from friends and relatives. There are magazines and books on each floor although, admittedly, they may not please all tastes. There is television on each unit. Newspapers are available from the commissary. One need not, and the court does not, find the MCC an agreeable place for an addicted reader in order to hold, as the court does, that respondents are not failing in their legal duties in this respect.

7. *Education.*—The educational programs available to the inmates include "GED" (General Educational Development—High School Equivalency Diploma), English as a second language, adult basic education, college courses through the Empire State College programs (including federal grants to cover inmates' tuition payments), and classes in art, dance, creative writing, human sexuality and family dynamics, life skills, world politics, sculpture, and drama. A closed circuit television system has been installed (it is not yet operational) which will allow inmates access to over 100 programs upon request.

Considering that the institution is but two years old, this is not an unimpressive catalogue. To be sure, school catalogues are not the most precisely reliable documents. And there are patent defects, including the fact that most classes are confined to single units, so that offerings are unavailable because of insufficient enrollment when there might be enough students were they drawn from the place as a whole. Once

more, the court notes a hope that a rethinking of movement restrictions may lead to amelioration. But whether or not that happens, petitioners' demands for expanded educational programs cannot be granted by the court. The difficulty of organizing a meaningful education program for a largely transient and extremely diverse population cannot be overestimated. All things considered, respondents are doing not merely an acceptable, but a commendable job in this respect.

8. *Jobs.*—Petitioners complain that there are not enough job opportunities available to inmates. There are no work-release programs; some inmates are employed in the institution either for low pay or none at all. The court is asked to order that respondents offer "constructive employment" to all inmates who wish it; that these inmates be paid at the federal minimum wage; that no inmates be required to work more than eight hours per day, five days per week; and that convicted prisoners be allowed to participate in work-release programs.

The court is not persuaded of any ground for interference in this area. Respondents appear to make genuine and earnest efforts to create employment opportunities. Inmates are employed in a variety of clerical and administrative tasks, though there are, of course, a limited number of these. Many work at jobs they would not have chosen in the outside world, such as kitchen and sanitation work, but this is to be borne in the nature of the case. The institution has just received authorization for a broom and brush factory, a "first" for a detention facility.

It remains a regrettable fact that jobs are not available for many of the inmates. But this is among those gravest of social ills that courts cannot cure. It is not utterly irrelevant that the case has proceeded during a time of severe unemployment all over the land, especially among minority groups disproportionately over-represented in jails and prisons. The MCC is located in a large urban center where there are far too few jobs even for those not in correctional facilities. See, e.g., "New York is Lowest in Youth Employment," *New York Times*, August 2, 1977, p. 30, col. 1. Respondents appear to be doing what they can. The court may not expect or order more.

9. *Commissary.*—Among the deprivations of the modular arrangement is the absence of a commissary, like those in many other penal institutions, where inmates may visit and shop for snacks, tobacco, and other things. An order form is distributed to inmates weekly, and orders are filled within the next day or so. Inmates are permitted to spend a total of $15.00 per week or up to $50.00 per month. Prices are set to cover the salaries of the commissary staff, and are subject to change without notice. There is no place to list a second choice on the order form; thus, if the inmate orders Brand A and it is out of stock, his order is returned with this advice, there being no means to have shown that Brand B, or even X, would have been preferred to nothing. When the

institution is being inventoried, no orders are taken.

Deposits to inmate commissary accounts are made by the institution pursuant to "authorization" forms signed by inmates, allowing the institution to endorse checks and money orders made out to inmates, and deposit them in the MCC's bank account. These forms appear, however, to have been executed in many cases at and for institutions other than the MCC. Money orders are credited to an inmate's account within one day; checks are cleared within 30 days. Five days each week, the institution accepts deposits during two specified hours directly at the institution.

Petitioners seek a variety of changes in these commissary arrangements:

(a) The establishment of a commissary they may visit every other day, or, alternatively, the acceptance of orders daily.
(b) A place for alternate choices on order forms.
(c) Cessation of the cashing of checks and money orders in the absence of specific consent to MCC's exercise of this authority.
(d) Speedier clearance of checks.
(e) Removal of the $50.00 limit.
(f) Sales at "cost."
(g) Extensions of the hours when deposits may be made in commissary accounts.

The court will grant, at least in part, the first four of these requests.

The opportunity to visit at a store is among the small material pleasures most sorely missed in the MCC. The testimony reflects this; the court could

know it judicially. Notwithstanding this, the court finds no constitutional or other basis upon which it could order the provision of this amenity. On the other hand, the niggardly allowance of orders once weekly, plus the cavalier neglect to allow even second choices on the order form, represents a level of indifference that satisfies legal as well as lay notions of arbitrariness and caprice. The practice respondents defend means that an inmate unlucky enough to arrive the day after commissary orders are taken goes two weeks without the snacks or toiletries or tobacco he would wish to buy. The denial of a place for second choices reflects, in a petty but galling fashion, the kind of indifference the Bureau of Prisons has striven with much success to avoid in other respects. See *Wright* v. *McMann*, 387 F.2d 519, 525-26 (2d Cir. 1967). The quality of this stance is reflected in a Post-Trial Memorandum, where respondents say (218f *):

> "Petitioners' suggestion that the ordering procedures provide for alternate selections is a good one, and respondents will endeavor to implement it at the MCC. There is, however, no basis for the contention that such an administrative reform is constitutionally required."

There is no suggestion in this observation, or elsewhere, why respondents propose only to "endeavor," with no clear confidence of success, to meet this minimum dictate of reasoned decency. Nor is there any sound reason why the MCC, unlike jails and prisons across the land, should allow orders only once weekly.

It takes less than the Constitution to require correction of this condition.

To remedy these aspects in which the MCC's practices must be condemned as arbitrary and capricious, the court will require that commissary orders be taken at least every other day and that the forms make provision for second choices. At least one court has been more liberal, requiring arrangements for daily commissary orders. *Miller* v. *Carson*, No. 74-382-Civ.-J-S (M.D.Fla., Jan. 31, 1975). It was thought that a Florida jail could and should manage that. Perhaps respondents will strive successfully toward the same goal. Perhaps if the Bureau of Prisons comes to be widely outdone in this and other respects, there will be no reasonable ground for sustaining the continued lag. For the time being, the provision now made seems suitably conservative and sufficient. As for the second choices, the enforcement of respondents' favorable inclination accords with a weighty judgment closer to home. *Giampetruzzi* v. *Malcolm*, 406 F.Supp. 836, 846 (S.D.N.Y. 1975) (Lasker, J.). The court will so order.

The practice of endorsing inmates' checks and money orders without their specific consent is not defensible, and must be ended. There was testimony by a number of petitioners that remittances of this nature were on many occasions expected by them but never credited to their accounts. There is not sufficient evidence of specific conversion or misappropriation, but the Center's practice invites and supports hostile suspicion. It is arbitrary and capricious and,

if there is need to add it, a taking of property without due process of law.

A related item of seeming neglect, neither explained in the record nor seemingly explicable, is the 30-day delay before a check is credited to an inmate's account. Whatever banking and postal troubles we may lately have seen, this is not allowable on any reasonable basis. The MCC will credit checks in not more than 15 days unless there is good cause, duly communicated, for doing otherwise.

The remaining complaints concerning the commissary must be rejected. The limit of $50.00 monthly is dubious. It will bear reexamination as prices continue to rise. But it is not beyond respondents' powers, especially as mitigated today by the determination that receipt of packages be allowed. (See *infra*.)

There is no legal basis for demanding commissary sales at cost.

Finally, it is plausible to demand that there be an expansion of the hours for deposits in commissary accounts. But the record contains no concrete evidence of hardship on this score. As problems arise, if they do, respondents should have primary authority to consider their extent and possible solutions.

B. OVERCROWDING

In the architectural and logistical plans as they were finally fixed, the MCC was designed to house a maximum of 449 inmates. That "rated capacity" has been routinely and substantially exceeded throughout

the short history of the jail. Even before it opened, rooms designed for single occupancy were being fitted with double bunks to hold two inmates—an arrangement since discontinued by order of this court, 428 F.Supp. 333, 335-40 (1977). There remain problems of overcrowding postponed to the plenary trial. Petitioners complain against two conditions, the existence of which respondents do not dispute: (1) the housing of 20 inmates in dormitories designed for 10, and (2) the use of common areas for sleeping men on cots, or even on the floors. The court finds that petitioners should prevail on both of these contentions.

Preliminarily, there is much to be said, resting upon broad principle and specific precedent, for the proposition that confinement in numbers that exceed rated capacity is in itself impermissible. *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm*, 520 F.2d 392, 398 (2d Cir. 1975); *Ambrose* v. *Malcolm*, 414 F.Supp. 485, 493-494 (S.D.N.Y. 1976); *Taylor* v. *Sterrett*, 344 F.Supp. 411, 423 (N.D.Tex. 1972), aff'd in part, rev'd in part, 499 F.2d 367 (5th Cir. 1974), cert. denied, 420 U.S. 983, 95 S.Ct. 1414, 43 L.Ed.2d 665, reh. denied, 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed.2d 463 (1975); *Hamilton* v. *Schiro*, 338 F.Supp. 1016 (E.D.La. 1970), order entered *sub nom. Hamilton* v. *Landrieu*, 351 F.Supp. 549, 551 (E.D.La. 1972); *Miller* v. *Carson*, 401 F.Supp. 835, 899 (M.D.Fla. 1975); *Pugh* v. *Locke*, 406 F.Supp. 318, 322 (M.D.Ala. 1976), citing order entered jointly in *Pugh* and in *McCray* v. *Sullivan*, 399 F.Supp. 271 (S.D.Ala. 1975). When the respondents, or others

with roles of authority in the responsible agencies, designed the MCC, they knew and intended, in the apposite word of defendant Director Carlson, that the facilities to be built would not be "plush." So it is significant that they planned, and proclaimed the plan, that the MCC would house 449 inmates, not the much larger numbers they quickly contrived to bundle into the building. See *Hanly* v. *Mitchell*, 460 F.2d 640, 643 (2d Cir. 1972), cert. denied *sub nom. Hanly* v. *Kleindienst*, 409 U.S. 990, 93 S.Ct. 313, 34 L.Ed.2d 256 (1972); *Hanly* v. *Kleindienst*, 471 F.2d 823, 826 (2d Cir. 1972), cert. denied, 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed.2d 974 (1974). It is not necessary to hold defendants' own plans and ratings against them with the force of invariable regulations. Cf. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *Service* v. *Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); *U. S. ex rel. Donham* v. *Resor*, 436 F.2d 751 (2d Cir. 1971); *Smith* v. *Resor*, 406 F.2d 141 (2d Cir. 1969); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969). It may be that deviations from rated capacities will in a proper case be justified. On the other hand, it will not do to argue, as respondents do, that their ratings may never be held binding lest the jailers proceed forthwith to abandon civilized estimates and publish only barbaric plans.[19] On that appraisal of executive

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[19] Respondents' Memorandum 101-102:

"[E]nforcement of a 'rated capacity' rule as petitioners suggest can only discourage planners from experimenting or providing additional amenities in terms of the physical

probity, we could never have had the long line of cases, of which a few are cited just above, holding officials to their own voluntary regulations.

In this court's view, it is enough for this case to say that the rated capacity as given by the prison officials themselves is strong evidence of what the facility and its components should hold. Approaching the two specific problems in that light, the court has confronted (a) living conditions grossly short of minimal decency, and (b) no semblance of justification except the general defense that the facilities of the Bureau of Prisons are *in toto* insufficient to house all the people consigned to them. That sort of defense has been rejected over and over again in cases involving state prisons. *Rhem* v. *Malcolm*, 527 F.2d 1041, 1043-44 (2d Cir. 1975); *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm*, 520 F.2d 392, 399 (2d Cir. 1975); *Rhem* v. *Malcolm*, 507 F.2d 333, 341 n.20 (2d Cir. 1974); *Gates* v. *Collier*, 501 F.2d 1291, 1319-1320 (5th Cir. 1974); *Jackson* v. *Bishop*, 404 F.2d 571, 580 (9th Cir. 1968); *Nadeau* v. *Helgemoe*, 423 F.Supp. 1250, 1264 (D.N.H. 1976);

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environment and the amount of space as has been done at the MCC. To the contrary, it will encourage planners to moderate, and indeed, to gear their designs to providing only the absolute minimum amount of space (or initially rating their facilities at such a minimum) in order to establish the highest possible capacity for fear that in a future emergency situation of a rising population the courts would not permit an upward adjustment of capacity even within the limits of generally accepted square footage requirements. Such a development would be unfortunate, indeed."

Hamilton v. *Love*, 328 F.Supp. 1182, 1194 (E.D.Ark. 1971); *Holt* v. *Sarver*, 309 F.Supp. 362, 385 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971). It has become clear by now that the exuberant rate at which we jail people[20] exacts a price for humane accommodations unless we are to repeal or revise principles of decency lately evolved. It is also clear in this light that the defensive posture of respondents must be deemed infirm. We are told that all the Bureau of Prisons facilities together can house approximately 22,500 people whereas the higher total of 29,050 were, as of the time of trial, assigned for federal confinement. The court is driven to a narrowly dispositive answer and a relevant observation or two.

First, and perhaps decisively, the court may adjudicate only upon the case and the facility before it; whether or how other jails or prisons may be stretched to greater capacity is not directly or meaningfully presented. While the court is not free to ignore the total setting, it is neither equipped nor authorized to judge the Bureau of Prisons as a whole.

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[20] See United Nations Document A/CONF.56/6, "The Treatment of Offenders, in Custody or in the Community, with Special Reference to the Implementation of the Standard Minimum Rules for the Treatment of Prisoners Adopted by the United Nations," Annex II (working paper prepared by the Secretariat for the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1975). The cited document reflects the leadership role of the United States in numbers of people incarcerated as a proportion of the population. See, also, *U.S. Prison Population Sets Another Record*, 3 Corrections Magazine 3 (March 1977).

We do not know—we are not told—how varying conditions and facilities elsewhere may be thought to serve lawfully in confining numbers greater than originally intended. This case concerns a particular facility designed largely for pre-trial detainees and for other purposes associated with an urban jail-type structure connected with busy urban courts. Generalities about a whole prison system, lumping everything together and serving up grand and unparticularized totals, cannot play a material part in decision of this concrete case.

Second, the standards the court may enforce are minima; they may not be ignored or avoided on claims of administrative burden or expense.

Third, even a court may know that the numbers now confined in federal prisons are comfortably within the capacities of the Nation to house in conditions of minimum decency. We have produced adequate housing for hundreds of thousands in short days or weeks when the urgencies of warfare required it. The richest country in the world, carrying the message of human rights around the world, is capable of finding decent living quarters for the 6550 excess of prisoners over the 22,500 for whom there are said to be existing facilities. All of us whose jobs have to do with incarcerating people—the lawmakers, the prison officials, and the judges—are in some measure collaborators. But we are all bound to our separate duties under the oath to support the Constitution and the laws. When, as here, a case is properly brought

to assail conditions of confinement, it cannot be a sufficient defense that circumstances variously conceded to be "undesirable" or "uncomfortable" or "unsatisfactory" or otherwise regrettable must be held sufficient because the money to improve them has not been appropriated.

Upon the broad premises thus stated, we turn to the specific issues relating to the dormitories and the use of common areas as sleeping quarters.

1. *The dormitories.*—The dormitories were each designed to house 10 men on single beds.[21] They have been refitted with double bunks, and are now holding double their intended number. This means there are 20 men in each dormitory, or a total of 120 on the unit rather than the 60 for which the unit was designed. The result is described by respondents as "unsatisfactory" but not unlawful. "Unsatisfactory" is a mild characterization. The situation within each dormitory is one of intolerable crowding, strain, and distortion of facilities, and an obvious potential for the tensions of stretched nerves. Similar consequences permeate the unit as a whole; common facilities designed for 60 men are jammed and rendered miserable when made to serve for 120. The doubling of dormitory occupancy is held, in sum, to descend below the constitutional minimum, both for detainees and

[21] Petitioners claim the number should be nine. They rely upon an early sketch, changed as the plans progressed. The evidence sustains the view of respondents that the matured plan contemplated 10.

for sentenced prisoners, including those in the MCC on writs.

The list of oppressions and discomforts from packing two men into each space meant for one is not short. The double bunks are crampingly close together; single beds similarly spaced would be tolerable, if by no means luxurious. The common furniture within each dormitory has become a clutter—roughly doubling the two tables and eight chairs originally planned—so that there is scarcely room to move about. The common toilet facility is grossly inadequate.[22] Privacy is, of course, nonexistent in a dormitory, but the wretchedness of forced company is intensified by the added crowding and noise of twice the number meant to be there.[23] The solace of reading

[22] Each dormitory has a common bathroom with two sinks, one urinal, one toilet bowl, and one shower. It has been suggested in our record that this might do for as many as 15 men. Accepting that stinting estimate, we might order the dormitories reduced to no more than 15 occupants if toilet facilities were the only problem. But the cumulation of difficulties from packing 120 men into facilities for 60, and the overall absence of any suggestion of a viable number in between, leads ultimately to a ruling for the original design, and not more.

[23] Petitioners have sought a determination that dormitories may not be employed at all, that each inmate must have a separate room unless he or she consents to dormitory living. While that is by no means an extravagant proposal, according as it does with standards widely supported, American Bar Association, *Tentative Draft of Standards Relating to the Legal Status of Prisoners* § 6.12(b) and Commentary, 14 Am.Crim.Law Rev. 559-61 (1977) (hereinafter "ABA Standards"); National Advisory Commission on Criminal Justice Standards and Goals, Corrections § 2.5(1) (1973), the court

and writing is impaired for those who might use it; reading lights meant for 10 single beds are blocked for those in bottom bunks.

The increase from 60 to 120 spreads discomfort and deprivation throughout the common facilities of the unit. The common area as a whole, which is all the men have for recreation and eating outside the dormitories, has become unacceptably crowded and noisy. A kitchen designed to heat food for 60 people cannot perform adequately for 120. Exercise equipment and common furniture are overtaxed and impaired for everybody. Like the dormitories themselves, the common space is generally more constricted, noisier, and more unpleasant than its designers envisioned.[24]

is not persuaded that it may be ordered as a matter of either constitutional or statutory right. There is tension, to be sure, in shared sleeping quarters. There are some obvious dangers of assault and other injuries even if the record before us lacks specific illustrations. But the problems seem manageable enough to leave the choice within the judgment of respondents. Perhaps we shall evolve to the higher minimum petitioners urge. At the moment, we are too close to wars and barracks, and too aware of slum housing visible from this courthouse, to hold that dormitories are *per se* forbidden. Cf. R. Titmuss, *Essays on the 'Western State'* 85-87 (2d ed. 1963). The separate, narrower question of classifying inmates so that dangerous men are not placed in dormitories has been dealt with above.

[24] Again, the factors might not singly condemn the arrangement. The court has ruled, for example, that the noise level is not in itself beyond limits we might order. It remains higher and more unpleasant than it would be had the plans been followed, and it adds to the totality of factors leading to condemnation of respondents' departure.

The visiting room, subject of other, separate complaints, has a special quality of bedlam in the dormitory unit. Planned for visitors who might be expected by 60 inmates, that room is not sufficient for 120.

This matter of the dormitories is not reducible to arithmetic, but has been the subject of arithmetical debates that are not irrelevant. Petitioners, taking the dormitory by itself, calculate that the inmate has only 43.25 square feet of living space, far below the bare minimum set by correctional experts and some courts.[25] But this excludes the common area entirely. Respondents would divide the common area among the 120 people in the unit, arriving at 68 square feet per inmate for his share of dormitory plus common space. But this ignores the modular principle, neglecting the important fact that other jails (and cases) include relatively accessible gymnasiums, auditoriums, chapels, and outside recreational areas, none of which are divided up and "allotted" to individual inmates for purposes of calculating square feet of living space. Without playing more detailed games with numbers, the court is driven to conclude that petitioners' calculation is closer to the mark and that the "correct" number, whatever it is thought to be, is below an acceptable minimum.

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[25] The American Correctional Association sets the standard at 75 feet. *Ambrose* v. *Malcolm,* 414 F.Supp. 485, 489, 492-493 (S.D.N.Y. 1976). Some decisions have accepted less. *Pugh* v. *Locke,* 406 F.Supp. 318, 334 (M.D.Ala. 1975) (60 square feet); *Gates* v. *Collier,* 423 F.Supp. 732, 743 (N.D.Miss. 1976) (50 square feet).

Concluding, as the court does, that doubling the occupancy of the dormitories is to be enjoined, we confront a somewhat nebulous question: where should the line be drawn? It seems improbable, if not impossible, that petitioners would have prevailed on this issue had room been made for an eleventh inmate, and no more, in each dormitory. In granting relief, then, it might be possible to guess our way toward some number well below 20 but possibly above 10. But respondents, having chosen simply to pile 120 men into spaces for 60, have tendered no evidence that could justify any confident determination of some intermediate number. Moreover, their tendency to exceed rated capacity in repeated and varied respects—in double celling, in the dormitories, in the balconies (*infra*), and elsewhere—counsels against sanctioning any departure of this kind. We apply wisdom of respondents themselves—especially in view of the fact that sudden influxes of short-term residents are routinely to be expected, and allowed for, in the MCC—when we hold the spaces to rated capacities in the absence of some solidly based rationale for doing otherwise.[26] The decree will order that the

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[26] Respondent Warden recounted that shortly after opening the MCC, overflow inmates were housed in an area intended to be a magistrate's courtroom on the third floor. Originally this was limited to inmates stopping over en route between other institutions and "weekenders," but as pre-trial and sentenced inmates began to be assigned to the temporary dormitory, its use was discontinued to avoid the temptation to use the room as a permanent housing facility. The area is currently used as a staff lounge.

dormitories be used as they were meant to be, for 10 men each. Since this is a court of equity, both sides may appeal to the aspects of conscience and flexibility informing the familiar jurisprudence. An emergency —some powerful showing of necessity and suitability —may justify a relaxation at some future time. For now, however, the law and the evidence compel an order restoring the living conditions respondents planned and represented.

2. *Sleeping in corridors and common areas.*—With a frequency that respondents (having the detailed facts) have chosen not to identify exactly, but averaging several nights in substantially every week, inmates are assigned to sleep on cots in corridors, on balconies, or in other common areas because there is no room elsewhere to which they may be assigned. Respondents try to avoid this concededly unsatisfactory arrangement to the extent possible. Inmates are moved from the common areas as soon as room space opens for them, in order of length of stay in the open sections. Nevertheless, the practice is so regular and widespread that according to respondents' own evidence, people sleep in common areas for up to five or more days at a stretch. Further indicating the extent of the arrangement, as many as six to nine inmates have been assigned to sleep on a single balcony for one or more nights.

For a place of pre-trial detention, where it was known from the outset that there would be a large transient population, respondents must be found to

have acted arbitrarily and capriciously, in violation of their statutory duties, in allowing such a condition to prevail. The inmate assigned to sleep on a balcony or similar open space has, literally, zero square feet of his own living space. His cot is unfolded only at night. His belongings are stored in boxes taken from him in the daytime. The lights burn all night. However many happen to be spilled into the common area for the night, there is one bathroom available for all.

Admittedly distressed by this situation, respondents offer nothing sufficient to justify it. Here, as elsewhere, they tell of an overcrowded prison *system.* They tell of measures they have taken—placing immigration detainees elsewhere, renting a new Community Treatment Center, and adjusting bus schedules—, then despair of doing anything more. Considering all the marvels of modern transportation, the several other facilities within relatively short distances, and the known character of MCC uses, respondents demonstrate nothing like the compelling necessity that might justify an occasional night, if not whole weeks, on a balcony. The overall growth of prison population cannot be permitted to come as an ugly miracle upon our prison experts, justifying miseries and degeneration in advance of the opening of new and "modern" facilities. Aside from that, the sweeping explanation that things are overcrowded everywhere simply bypasses the concrete questions in this concrete case. To elaborate on a thought expressed earlier, "overcrowding" in Springfield, Missouri, or on the open spaces at Eglin Air Force Base,

or at the country barracks of Allenwood, or in maximum security prisons (assuming those places *are* all overcrowded) may mean quite different things, may generate quite different issues, and may allow of different (perhaps better) justifications than anything even suggested here. What we have in this case is a newly planned and newly built facility, supposedly constructed with foreseeable needs in view, and dedicated instantly to misuse and wretched living arrangements for those confined in it. Designed primarily for presumptively innocent detainees and others expected to stay for short periods, the MCC had to be known in advance as a place where there would be relatively large influxes and exoduses during short spans of time. Knowing that, respondents have proceeded from the outset to handle fully expected events as if they were astonishments and emergencies. Inmates arriving predictably in somewhat unpredictable numbers overload the place and have no proper area of any kind in which to sleep or live their time of confinement. The balconies and other common areas become in practical effect substantially regular portions of the sleeping accommodations.[27]

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[27] The Government's expert, George Camp, First Deputy Commissioner of New York State Division of Criminal Justice Services, testified that common areas "should not be used on a regular basis" as sleeping quarters. It reflects no lack of deference to observe that expert opinion may not have been necessary to make the point. The grave discomforts, for those assigned to sleep this way and for everyone else, could have been predicted. The record of this case fulfills the prediction.

Such a swift perversion of a supposedly planned and newly opened jail cannot be allowed. The failure to plan for the most obvious needs, resulting in distress for inmates readily acknowledged by respondents to be grievous, must be deemed both (a) a violation of the statutory duty to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all "federal detainees, sentenced inmates, and witnesses in custody, 18 U.S.C. § 4042(2), and (b), more broadly, the kind of arbitrary and capricious action correctible under the Administrative Procedure Act.

The decree to be entered will forbid the use of MCC's common areas as sleeping quarters.

C. VISITING

1. *Family and social visits.*—When this case began, inmates were allowed three visits per week. Visiting hours were:

2d and 5th floor:	8:30-11:30 a.m., every day 4:30- 7:30 p.m., weekdays
9th floor:	8:30-11:30 a.m., every day
3d, 7th, and 11th floors:	12:30- 3:00 p.m., every day.

Each inmate could have a list of six visitors, family or friends. On January 13, 1976, the respondent Warden gave four days' notice that he was curtailing both the hours and the allowable list of visitors. This remarkably brief notice, to both the affected inmates and the court, during a lawsuit, contrasted notably with the substantially longer notice the

Warden had given to the union representing members of the prison staff. Petitioners moved by order to show cause to prevent the abrupt curtailment. First by temporary restraining order, then by a preliminary injunction, the court granted the requested relief. 406 F.Supp. 1243 (1976).

Petitioners pressed at trial contentions that the visiting arrangements thus preserved *pendente lite* were inadequate. They presented testimony, supplemented by the court's observations, that delays in processing visitors and visting room conditions tended to abbreviate severely the time available for actual visiting within the range of seemingly available hours.

The detailed proof of these propositions covered the visiting process from the visitor's arrival to departure. The visitor arriving at MCC's entrance lobby fills out a form which is given to a guard. The form is checked against the inmate's visiting list, and the inmate's living unit is determined from a locator list. When a number of visitors have been so processed, a guard ushers them through a magnetometer, frisks each visitor with a portable metal detector, and searches female visitors' purses. The visitor's hand is then stamped with a password in an ink visible only under ultraviolet light. The guard calls the inmate's unit and informs a member of the staff that the inmate has a visitor. Visitors are then taken up to the residential floors.

On each floor, between the two modular units, there are two visiting rooms, one for each unit, separated by a central guard room. Visitors enter through

the guard's room and are ushered into the visiting rooms on either side. The visiting room, the dimensions of which are about 22′ X 19′, contains one or two couches and a number of chairs, often supplemented by chairs the inmates bring in from the common area within their units. The visitors' room has a bathroom adjoining it, but this, through most of the months this case was pending, had been locked and barred from use following a reported instance when an inmate had used it to change clothes and effect an escape.

Visitors are admitted into the respective rooms by the guard at the central desk. After the visitor's arrival, the unit guard locates the inmate, and brings him or her to the visitors' room. Visitors and inmates are observable from the guard's desk through the glass walls of the visitors' room.

There was persuasive testimony that these visiting procedures were so conducted that the processing of a visitor from lobby to visiting room could consume from 35 minutes to two hours, depending on the number of visitors at a given time. There were seemingly well-founded complaints that visting rooms became overcrowded, hot, and noisy. The range of visiting hours, compressed by the processing routine, contributed to the crowding, noise, and general discomfort, including frequent occasions when there were not enough seats for those in the room. Overcrowding led the guards frequently to terminate visits after stays of less than an hour, and well before the end of the ostensible visiting period. The

locked bathroom made it necessary for a visitor needing such facilities to sacrifice the time for a round trip to and from the lobby for that purpose.

Respondents proceeded through some remarkable changes of position during the pendency of this case. When he came on to testify as a witness, on March 27, 1977, the Warden, who had found in January, 1976, a need to cut visits sharply and precipitately, announced a liberalization of visiting privileges. Now, we have been assured, another guard will be added in the lobby for expediting the processing of vistors. In addition to existing morning hours, all visiting rooms will be open from 12:30 p.m. to 4:00 p.m. and again from 5:30 p.m. to 7:30 p.m., Tuesday through Friday. Additionally, each unit except the dormitory will have 3½ hours of visiting on Saturday and Sunday, alternating mornings and afternoons (i.e., Saturday morning and Sunday afternoon in one week, then Saturday afternoon and Sunday morning the next). The dormitory visiting room will be open both morning and afternoon sessions on weekends.

Having acknowledged that "the visiting program has not been completely problem-free," [28] but having improved the situation substantially, respondents observe that "[the new] system for visiting * * * provides substantial visiting opportunities for all inmates and clearly surpasses constitutional requirements." [29] There is an implication that further court intervention would be unjustified.

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[28] Respondents' Post-Trial Memorandum 127.

[29] Id. 132.

There are, however, countervailing considerations of some consequence. As will appear further in the course of today's rulings, the respondents have repeatedly found it suitable during the pendency of this case to improve conditions of which petitioners complained. It is plain that most of these improvements have been spurred by the lawsuit and would not have happened otherwise. The visiting situation is in some respects the most striking and unsettling of all these incidents. Within the space of little more than a year, respondents have ricocheted from a decision that visiting should be more restricted to a conclusion that it will be liberalized.

Against this background, the matter is not fairly ended when we conclude, as the court substantially does, that respondents should not be ordered to allow more visiting opportunities and facilities than they have now confirmed. Whether or not the court would have ordered this much over respondents' opposition, we now have the clearest kind of demonstration that this much is feasible and approved by respondents themselves. The feasibility in the future will be even more certain under this court's decision, which elsewhere orders population decreases that will ease the pressure of numbers upon visiting procedures and facilities. In such circumstances, it seems wholly equitable to require that respondents not diminish or impair the stated arrangements at any future time except upon a showing of good cause for the change. The decree to be entered will so order. In the circumstances respondents have themselves created, "the

court's order should constitute no additional burden." *Zurak* v. *Regan*, 550 F.2d 86, 95 (2d Cir. 1977). Specifically, it will be adjudged that respondents may not decrease visiting hours or allow deterioration in visiting processes or faciilties except after notice to the court and petitioners of an intention to do so and a showing of good cause for such action to be made not less than 30 days after the giving of notice.

One other aspect of the visiting setup requires action by the court. As has been mentioned, after one was used in connection with an escape that should have been preventable in the light of the MCC's elaborate security arrangements, all the visiting room bathrooms were locked, and they stayed locked for a period of some eleven months. A week before the Warden testified, respondents effected another of their revisions *pendente lite*. The bathrooms are now accessible to a visitor upon request; a guard, equipped with the key, will open the facility and admit the visitor who has asked for this assistance. The court finds from its observation of all the pertinent circumstances—including the elaborate measures to ensure that only poeple duly stamped, inspected, and scrutinized pass through the series of locked doors to the outside—that the annoyance and indignity of this bathroom arrangement is not justified. Here and throughout, the court is keenly cognizant of the fact that prison officials, not judges, are primarily in charge of safety and security in places of confinement. At the same time, the court is not free to blink away the common awareness that zeal for security is among the most common varieties of official excess.[30] Here, having observed the locks, the array of closed-circuit TV cameras, the invisible ink, and the long, slow journeys of court and counsel through the security network on our several visits, the court is compelled to conclude that the locked bathroom, accessible only with a guard's help, is an arbitrarily and capriciously excessive item of protection, unjustified by the vague and unexplained history of one improbable escape. The visiting room bathrooms will be kept open, lockable only by the occupants, during visiting hours.

Having ordered that much, the court is not persuaded that petitioners have shown grounds for sundry other forms of claimed relief in relation to family and social visits. There is no constitutional or statutory basis for ordering the lengthened hours (8:00 a.m. to 10:00 p.m. daily), the unlimited rosters of visitors, the provision of a non-smoking room on each floor, and other amenities petitioners demand, however desirable some or all of these might seem to the court as a matter of policy. We note in this connection that another coincidence in the case has been the placement of soft-drink machines in the visitors' rooms while the court was hearing evidence about the absence of such luxuries. It is to be hoped that such improvements, however prompted, will continue. The court concludes, however, that it is not empowered to order them.

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[30] See G. Sykes, *The Society of Captives* 19-21 (1958).

2. *Attorneys' visits.*—When this action was instituted, procedures and physical arrangements for attorney-client meetings, especially in view of MCC's primary function as a pre-trial detention center, were gravely deficient. A significant number of visits by attorneys were made in the general visiting rooms, under the same conditions of noise, crowding, and non-privacy as those attending social visits. In addition, the visiting rooms were open for meetings with attorneys after general visiting hours. With advance notice, counsel could have special visits in private rooms. There were serious problems of long delays and other inconveniences.

It has become unnecessary, however, to review in detail the situation for which the case was in part brought and to which much evidence was addressed. Again, "[t]he MCC has recognized that there have been problems with the attorney visiting facilities and procedures, and in order to remedy these problems, the institution has developed new facilities." [31] These improvements were announced by respondents shortly before the trial began. The new facilities are to include five attorney conference rooms as well as a larger common space furnished with conference tables. This area will be open from 8 a.m. to 8 p.m., seven days a week. A stairway, which attorneys may travel unescorted, will lead directly from the lobby to the conference area. Attorneys will be issued special identification passes, and it will no longer be neces-

[31] Respondents' Post-Trial Memorandum 118.

sary to give the advance notice formerly required for special visits.

Agreeing that these changes will substantially improve the circumstances of attorney visiting, petitioners request that the court order certain "refinements" in order to protect inmates' Sixth Amendment rights. The court has concluded that petitioners can demonstrate no right at this time to more than respondents have volunteered. It may be that the new arrangements, as yet incomplete and untested, will be found defective in one respect or another. As respondents' plans are projected, however, they seem amply to accommodate the need for attorney-client access.

Accepting the revised facilities and procedures as sufficient, the court will merely require, as in the earlier determination respecting social visits, that respondents maintain the promised improvements and neither effect nor allow deterioration in attorney-client visiting arrangements without prior notice and a showing of good cause.

3. *Visits with codefendants.*—Respondents report that an unnamed judge of this court in an unnamed case once "very strenuously objected" to the allowance of meetings between codefendants awaiting trial in the MCC. Seemingly built upon that episode is the current policy of denying such visits in the absense of specific court orders directing them. With all deference to all colleagues in every branch, the court finds the policy indefensible. Except for the unavoidably burdensome incidents of confinement, pre-trial

detainees have an elementary right to prepare for trial. The right must include for them, as it does for people on the outside, reasonable freedom to confer with codefendants. Respondents must supply such opportunities in the absence of a specific court order in a specific case forbidding this.

4. *Conjugal visits.*—With perhaps more proof than even a court might require, petitioners have demonstrated that the deprivation of sexual intimacies is a cause of tension, frustration, and anguish. A distinguished expert, Dr. Columbus B. Hopper, testified to experience in Mississippi and elsewhere indicating that conjugal visits are salutary and feasible. Other experts and inmate witnesses supported his view. Upon a substantial record of this nature, and invoking decisions protective of sexual privacy and freedom, e.g., *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), petitioners claim a constitutional right to conjugal visits. As the case developed, their use of the word "conjugal" became somewhat expansive; they presented as a star witness a married male prisoner and an unmarried female prisoner, both serving sentences, who seek conjugal visits with each other.

This extension of the position highlights what the court finds to be the essential flaw. The problems of sexual behavior, the extent to which sexual activity must be sacrificed for one perceived public necessity or another, the variety of beliefs about marital, nonmarital, and other kinds of sex, the kinds of deprivation suitably to be allowed as punishment—matters

like these are in the realm of mores and public attitudes outside the proper sphere of judges as judges. Whatever one judge or another might think about the difficult policy choices and psychological factors —for example, about the question of strictly "conjugal" visits in the traditional sense and their possible effects upon unmarried inmates—the decision of such matters must be left in the foreseeable future for elected representatives of the people.

Petitioners acknowledge the conflict of views on this subject among experts and policy-makers. Indeed, on a count of the voices, respondents, notwithstanding a quaint typo, are substantially accurate when they say petitioners' Dr. Hopper "admits that the dormant [*sic*] view of correctional experts in this country is still opposed * * *." [32] The weight of judicial authority is likewise adverse to petitioners. *McCray* v. *Sullivan*, 509 F.2d 1332, 1334 (5th Cir. 1975); *Sandoval* v. *James*, No. C-72-2213 RFP (N.D. Cal., Oct. 3, 1975); *Lyons* v. *Gilligan*, 382 F.Supp. 198 (N.D.Ohio 1974); *Wayne County Jail Inmates* v. *Wayne County Board of Commissioners*, Civil Action 173-217 (Wayne Cy. Cir. Ct. 1971). But petitioners are not daunted. They do not acknowledge, they proclaim, the paucity of authority, saying:

> "Only one court has had the courage to find that inmates are entitled to conjugal visiting as a matter of constitutional right. *Government of*

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[32] Id. 135.

the Virgin Islands v. *Gereau*, 3 Prison L.Rptr. 20 (D.V.I., May 30, 1973)."

With all deference, and without stopping over the meaning of "courage" in such a context, this court rejects the challenge. Whether or not there may be conjugal visits in federal jails or prisons is left for the Congress and the Executive to decide.

D. TELEPHONES

Three subjects are argued with respect to the telephone service provided inmates at the MCC: (1) the extent to which respondents are in compliance with the preliminary injunction issued with respect to telephones earlier in this case, (2) petitioners' claim that the existing services should be expanded, and (3) the validity of Bureau of Prisons Policy Statement 7300.79 (2-20-73) ¶ 2 which permits the monitoring of inmate telephone calls.

1. *The outstanding injunction.*—Telephone service at the MCC is currently governed by order of this court entered October 1, 1976. Pursuant to that preliminary injunction, there are 23 pay telephones in the institution on which calls can be made to the 212 area. There are also 23 long-distance telephones on 11 trunk lines which are routed through a switchboard. In order to make a long-distance call, an inmate must pick up one of the receivers and wait for the switchboard operator to answer. The operator will then place the call, provided that the inmate has previously signed up to make it. It is this last re-

quirement, when applied to collect calls, which petitioners charge violates the preliminary injunction.

In proceeding toward a conclusion on this point favoring the respondents, the court recalls that the preliminary injunction came into being when the Telephone Company (without fierce resistance from the MCC) was about to rip all telephones out of the MCC because of an alleged plague of fraudulent credit-card and third-party calls. The injunctive arrangements were devised to deal with that problem while assuring a decent amount of telephone service for the inmates. The debate then and since has featured complaints by petitioners that there were not enough telephones, that long queues resulted to make calls, and that the situation led frequently to angry encounters and threatened violence among the inmates. It was in that setting that long-distance calls were ordered to be either collect or "pre-paid," the latter meaning payment would be made from the inmate's commissary account. Petitioners accept the system of advance sign-ups for pre-paid calls, but complain that the procedure is a gratuitous obstruction for collect calls. At the same time, not quite consistently, they charge, as has been noted, overtaxed telephone facilities, leading to frustration and conflict.

Much is made in the briefs on this issue concerning what was or was not intended by the preliminary injunction. The court concludes, however, that this is not now a matter of great interest. We are proceeding to a final decree. For that purpose, the court con-

cludes that the sign-up requirement for collect calls is a reasonable and valid measure. It serves petitioners' own stated objective of avoiding disputation over limited telephone facilities.

2. *Adequacy of telephone service.*—Petitioners complain variously about the number of telephones, delays in raising the MCC operator for long-distance calls, and the wall-mounted instruments which afford less privacy than would booths.

No claim for relief has been proved on this score. The evidence of overburdened telephones is neither impressive on its own nor improved by the court's own observations. The telephone service is undoubtedly imperfect. But it is in its setting adequate, if not generous.

3. *Monitoring.*—Respondents claim the power to "monitor" telephone calls, a position embodied in Bureau of Prisons Policy Statement 7300.79 (2-20-73), which says in relevant part:

> "2. *Monitoring Calls.* Each institution will establish procedures which will enable the monitoring of phone calls, said monitoring to be done to preserve the security and orderly management of the institution, and to insure that institution policy governing the use of phones is being followed."

MCC Policy Statement 7300-79 ¶ 7 (10-12-76), adopted pursuant to the Bureau of Prisons Statement, adds:

> "It should be pointed out, however, that Bureau Policy concerning access to attorneys allows inmates to place calls to their attorneys that are private. In keeping with the spirit and intent of this Policy, the MCC will not under any circumstances monitor attorney-client calls."

Petitioners assail the asserted authority to monitor, however it may be limited, and now seek an injunction against it. The point, if properly presented, would be substantial.

Respondents answer, however, and the court agrees, that the question has not been timely or suitably raised. It was not in the first amended petition or in any later amendment. The only pertinent testimony in the record is fragmentary and more or less accidental. Respondents had no occasion to develop, by evidence and otherwise, supposed justifications. On the contrary, defendant Warden's contribution, on cross-examination, was to report that no calls have in fact ever been monitored in the MCC. On such a record, the court should not and will not reach one of the few conceivable issues petitioners managed not to include properly in this case. Cf. *Browning Debenture Holders' Committee* v. *DASA Corporation*, 560 F.2d 1078, 1086 (2d Cir. 1977).

This leaves the subject of telephones where it has been since the preliminary injunction issued last October. Respondents have not appealed that order, nor have they offered new evidence or arguments to change it. Petitioners' arguments for additional relief have been overruled. It follows that the court should and will embody the terms of the preliminary injunction in the final decree.

E. MAIL

Several issues concerning mail were disposed of by summary judgment last January, when the court enjoined the reading of outgoing mail, sustained respondents' practices on "legal mail" (from attorneys and courts), and restricted respondents' surveillance and scrutiny of other incoming mail. 428 F.Supp. at 342-344. Some residual problems remain with respect to legal mail and respondents' procedures for delivery and forwarding mail.

1. *Legal mail.*—In ruling on the summary judgment motions, the court held adequate respondents' practices safeguarding the confidentiality of legal mail—namely, their rules allowing opening (not reading of) such mail for contraband, but only in the recipient's presence. It has become evident, however, that there is less than rigorous enforcement of these restrictions; in repeated instances, too numerous to be allowable slips, letters of this nature are delivered to the inmates after having been opened outside their presence. The record makes it appropriate that the court's decree command adherence, subject to appropriate sanctions for violation, to the agency's own rules.

There is in this connection an unnecessary dispute about the scope of "legal mail" for present purposes. After the court's decision of January 19, 1977, the Bureau, on May 23, issued revised regulations advising inmates that all "Special Mail," suitably marked, would be handled with the restrictions now approved

and ordered for correspondence from attorneys and courts. "Special Mail," in addition to that from federal courts and attorneys, includes under the revision correspondence from "members of Congress, embassies or consulates, the U.S. Department of Justice, governors, State attorneys general, prosecuting attorneys, [and] state courts * * *."[33] No reason is suggested why the court's decree should be narrower. The decree will, in any event, be coterminous with the regulations.

2. *Delayed mail.*—There are complaints that mail is unduly delayed after it reaches the institution before delivery to inmate addressees. This is perhaps a difficult, but not an impossible, contention to prove, as reflected in court orders requiring prompt deliveries, *Mitchell* v. *Untreiner*, 421 F.Supp. 886, 902 (N.D.Fla. 1976); *Collins* v. *Schoonfield*, Civ. No. 71-500-K (D.Md., July 27, 1972); *Boldings* v. *Jennings*, No. 76-73C2, 3 Prison L. Rptr. 259, 260 (W.D.Wash. 1974); *Lambert* v. *Skidmore*, No. C-2-74-135 (S.D. Ohio, May 30, 1975). But there is no convincing proof of the charge in this case. There is evidence of mail delayed in the Christmas season, but this is familiar on both sides of the prison walls. The claim of delayed pickups of outgoing mail is no more solidly supported. Petitioners' complaints on these subjects are rejected.

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[33] 42 Fed.Reg. 26,333, 26,336 (May 23, 1977) (to be codified in 28 CFR § 540.11).

3. *Non-forwarding of mail.*—When an inmate is transferred from MCC to another institution—often abruptly as will be discussed—mail thereafter received is not forwarded, but returned to the sender. Acknowledging this, respondents insist upon their right to continue the practice. They say:

> "Since there is no evidence indicating that inmates are unable to send change-of-adderss notices to the local Post Office station either before or after the transfer, there is no reason to impose that burden on the MCC." [34]

Even if such cold niggardliness is not a characteristic note, one might have hoped for its omission. The court does not sit, of course, to enforce magnanimity in government. But this is a clear case where a callous and ungenerous position happens also to be unsupportable in law.

It is not to be doubted that the distinguished respondents in this case appreciate the fundamental human needs answered by the mails to people in confinement. See, e.g., if citation is needed, *Taylor* v. *Sterrett*, 532 F.2d 462, 481 (5th Cir. 1976). Yet the bureaucratic indifference exercised in respondents' names brushes past simple decency for no good reason whatever. In the nature of the situation, inmates' mail will be returned to sender, not forwarded, when they have had no chance at all to redirect it for themselves by filing change-of-address notices. This is so, obviously, because transfers are sudden, often occur-

[34] Respondents' Post-Trial Memorandum 185.

ring after the sending, but before receipt, of the letter MCC finds itself unwilling to forward. Even where this is not so, the "burden" that worries respondents is inconsequential. The piece of mail must be handled in any case—whether to be returned or sent to its addressee. The extra trouble of digging out and writing a forwarding address—a beneficence commonly performed by irate former landlords, jaundiced ex-employers, and others not looked to for public examples of caring—is of no meaningful weight in this setting. Finally, as respondents must know as well as anyone, they deal with a group in which literacy, attention to workaday detail, and knowledge of agency procedures may be less prevalent than it is in the population at large. If an inmate neglec' 'or does not know about) a change-of-address notice, MCC personnel might find ready means to supply the omission rather than fight for the right to return the mail to its sender. The court will not compel, though it presumes to suggest, this procedure.

The court holds, however, in any event, that the refusal to forward mail is a species of obstinate neglect of vital needs that qualifies classically as arbitrary and capricious official conduct, totally unsupportable by any reason that can be deemed sound or sufficient in the circumstances. The court will order the relief petitioners seek in this respect.

F. SEARCHES

Two areas of dispute remain under this heading following the court's earlier decision, on summary

judgment, 428 F.Supp. at 341-43, requiring that petitioners be given receipts for things seized from their quarters: (1) the propriety of strip searches as routine procedures following visits, and (2) the practice of excluding inmates when their sleeping areas and possessions are being searched. On both subjects, the court concludes, petitioners are entitled to some relief.

The broad principles governing these questions as of now may be briefly summarized. It seems evident that people in confinement enjoy at least some of the Fourth Amendment's protection "against unreasonable searches and seizures * * *." *Bonner* v. *Coughlin*, 517 F.2d 1311, 1317 (7th Cir. 1975) (Stevens, J.); *Hodges* v. *Klein*, 412 F.Supp. 896, 899-903 (D.N.J. 1976), collecting cases. Undoubtedly the protection "does not rise to that possessed by the unincarcerated members of society." *Bonner* v. *Coughlin*, *supra*, at 1317. But there are points, which the court finds to have been transgressed in this case, beyond which searches and seizures, even in a jail, must be condemned as constitutionally "unreasonable."

There are also due process boundaries set by "the community's sense of fair play and decency." *Rochin* v. *California*, 342 U.S. 165, 173, 72 S.Ct. 205, 210, 96 L.Ed. 183 (1951). These limits, too, are exceeded by the forms of strip search respondents employ.

1. *Strip searches*—Under the questioned practice, every inmate—including pre-trial detainees held on charges ranging from mail embezzlement through stock fraud to narcotics dealings and bank robbery—

undergoes a strip search upon returning to his quarters from any visit. In the presence of a corrections officer, the male inmate must remove his clothes, display his armpits, open his mouth, raise his genitals, display the bottoms of his feet, and spread his buttocks for visual anal inspection. Female inmates must follow a similar procedure, including a visual vaginal inspection. The testimony of inmates and experts alike reveals qualities in this experience that a court might come close to noticing judicially. The stripping is unpleasant, embarrassing, and humiliating. The spreading and lifting of genitalia and the bending over to spread buttocks for anal inspection plunge the reaction to a level of deep degradation and submission. The postures petitioners are compelled to assume are calculated to trigger, in the officer and inmate respectively, feelings of sadism, terror, and incipient masochism that no one alive could have failed to predict. In the MCC, as elsewhere in such situations, male correction officers have been incited by the temptation to indulge the sense of a cheap *machismo*. There have been insultingly suggestive remarks and banal but terrifying expressions of aggression like those of guards threatening in the time of nakedness to "put [a] foot up [the] ass" or merely to "kick the ass" of the humbled prisoner. The court credits the testimony of inmates who have found this so high a price as to forego visits or to feel after a visit that it was not worthwhile.

A psychiatrist called by respondents acknowledged that the strip search experience "is something that

may not be wished," but went on to say "that it is part of the reality of the circumstance in which it is not only appropriate from a standpoint of the institution's security, but is something to which people can adapt and recognize and I would doubt that anybody was so severely upset by such an experience that they would require psychiatric care or, again, that there is a question of after effects of it." Accepting the psychiatric observation, if *dubitante*, but not those on security, the court holds that constitutional injury may occur short of emotional trauma leaving scars or requiring treatment.

The asserted justification for this grisly procedure is, of course, the claim that it is needed for security against the smuggling of weapons, drugs, and other contraband. As for specific experience, one female officer once espied in a prisoner's vagina a red balloon containing heroin. Another testified to discovering drugs in an inmate's shoes. There was no evidence that anal inspections had ever revealed any attempts at smuggling, and this is no surprise. The evidence is clear and uncontradicted that a person bent upon this mode of transport could insert an object beyond the anal spincter and render it invisible until its retrieval at some private moment later on.

But it must be added that the case for respondents is not ended with their slender proof of actual episodes when smuggling attempts were thwarted in strip searches. Defendant Warden and Bureau Director, among others, testified to a belief, which has a measure of pluasibility, that the prospect of the

strip search may serve as a deterrent to people planning to secrete and import forbidden things. The fact that the judgment is neither quantifiable nor flatly demonstrable does not deprive it of the authority with which respondents' experience and expertise must be deemed to invest it. Giving full weight to this factor, the court finds that it cannot justify the more extreme and offensive aspects of the strip search.

The test of reasonableness requires attention to the total setting. It is significant, therefore, that the inmates and their visitors are in full view during the visits and fully clad. The secreting of objects in rectal or genital areas becomes in this situation an imposing challenge to nerves and agility. The challenge, it must be expected, is surmountable by some, but likely in itself to deter many or most, especially pretrial detainess who may be hoping to vindicate their presumed innocence and may be hesitant to accomplish a new crime in the very arms of the law. For the probably slim minority who might attempt to smuggle things in their bodies, there remain search techniques short of the loathesome practice now in force. The paramount worry is, or ought to be, over possible importation of weapons or other dangerous instruments. These are discoverable by metal detecting devices and, if necessary, other equipment employed for airline security and other purposes.

There remain other things, mainly narcotics, that might still be secreted and evade detection. How serious this problem may be—and how far control-

lable by measures like the usual searches and urine tests—it is not possible to say with confidence. What we can know is that the goal of absolute security is unattainable, and we must assume that some contraband will continue to make its way into jails and prisons, as it always has—whether through visitors, guards, lawyers, clergymen, or otherwise. The court does not propose to treat lightly the security concerns of respondents. In today's resolution of the strip search problem, respondents will be permitted to go as far as may be permitted by the demands of reasonableness in the Fourth Amendment and the claims of decency in the Fifth.

The court concludes, upon the record and the developing precedents,[35] that respondents must cease

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[35] The decided cases cover a range that does not amount yet to a settled or definitive jurisprudence. In conditions of high security risk, in cases distinguishable from ours, searches of the kind in question have been allowed. *Daughtery* v. *Harris*, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872, 94 S.Ct. 112, 38 L.Ed.2d 91 (1973); *Hodges* v. *Klein*, 412 F. Supp. 896 (D.N.J. 1976); *Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836 (S.D.N.Y. 1975); *Penn El* v. *Riddle*, 399 F.Supp. 1059 (E.D.Va. 1975); *Gettleman* v. *Werner*, 377 F.Supp. 445 (W.D.Pa. 1974); *Bijeol* v. *Benson*, 404 F.Supp. 595 (S.D.Ind. 1975). A recent decision of an eminent colleague in the Northern District of New York goes farther in outlawing the practice than this court will in this case. *Frazier* v. *Ward*, 426 F.Supp. 1354, 1366 (N.D.N.Y. 1977). The court in *Frazier* held anal searches to violate both the Fourth and the Eighth Amendments as applied to the States by the Fourteenth. Other authorities arrayed against "the indignities of a rectal search," *Sostre* v. *Preiser*, 519 F.2d 763, 764 (2d Cir. 1975), in at least some circumstances include *Hodges* v. *Klein*, *supra*, at 903; *United States ex rel. Guy* v. *McCauley*, 385 F.Supp. 193 (E.D.Wis. 1974); and ABA Standards § 6.6(f)(iii).

the routine requirements of anal and genital inspections after visits. These affronts, repulsive in the most evident respects, are not warranted by the suspicions upon which respondents have proceeded. In all the circumstances, the demands of security are amply satisfied if inmates are required to disrobe, to have their clothing subjected to inspection, and to present open hands and arms to demonstate the absence of concealed objects. Even this much the court allows with grave reluctance, inviting reconsideration by wiser judges or respondents themselves in the more mature wisdom of future times. For now, however, sensitive to the primary authority of respondents for the protection of life and property, the court will forbid only the extreme measures of indignity now practiced. These, it is held, are unreasonable and "shocking," and thus forbidden by the Fourth and Fifth Amendments.

Also left to respondents by this ruling is the possibility of visually inspecting anal or genital areas upon a specific and particular demonstration of probable cause for doing so. In the rare cases where this may happen, the details of the probable cause must be recorded in writing, upon sworn statements of first-hand knowledge. The record will include the reasons, circumstances, and results of the search. A copy will be given to the inmate and preserved for later reference if and when a particular search or the practice in this regard comes again to be questioned. Cf. ABA Standards § 6.6(f)(iii).

2. *Room searches.*—The living areas of the MCC are searched at irregular intervals, and the searches are unannounced. The searches are of two types: formal unit shakedowns and informal searches of individual rooms (which are the more frequent type). For formal shakedowns, a team of guards clears the inmates from a particular portion of a living unit and searches each room. The inmates are not permitted to watch the searches. Correctional officers have discretion to allow an inmate to watch the informal search of his individual room. It is unclear how or how often this discretion is exercised.

Petitioners protest against the practice of barring them from positions where they may observe the searches of their rooms and possessions. The complaint rests upon some elementary concerns. In the MCC, as frequently happens elsewhere in the conduct of official searches, the few possessions of inmates are not treated with tenderness. Officers rummaging through clothing, papers, drawers, and other things, supposedly obligated to be neat, frequently aren't. Possessions are left in disarray. It is charged—but the court finds it unnecessary (indeed, impossible on the present record) to decide one way or another—that possessions are stolen by searching officers. This complaint had special point and urgency in the past, when respondents gave no receipts for seized property, a practice enjoined by the court on January 5, 1977, 428 F.Supp. at 342. The suspicion or belief remains a vital source of tension and hostility.

Allowing inmates to observe from a reasonable distance the searching of their rooms would go far to eliminate these grounds of complaint. An officer viewed by the owner is more likely to fulfill the stated duty to put things back as they were. The claim of stolen property is far less likely to be made, the grounds for suspicion, or ostensible suspicion, being largely obviated. Having one's things searched is no pleasure in the best of circumstances. Being denied the right even to watch the invasion is a blunt oppression.

Respondents justify the exclusion on two grounds. As phrased by defendant Warden Taylor,

> "the [first] reason * * * is to prevent inmates from distracting officers who are doing the searching and moving contraband from one area to another ahead of the search party. * * *
>
> "The other consideration is that during searches there sometimes arises a situation in which the inmate becomes argumentative and conflicts do develop between staff and inmates over the search."

These grounds are thought and urged by the Warden to override his view, expressed in the same response, that "it is important to preserve [and respect] as much as possible * * * the property of the inmate."

The court concludes that, at least with respect to pre-trial detainees, the Warden's appraisal of the competing interests cannot be sustained. The presumptively innocent prisoner's acknowledged interest in privacy and, it may be added, in minimal dignity,

may be overriden only upon a demonstration of compelling necessity. *Detainees of the Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975). The undocumented worries of respondents have neither the quality nor the substantiality to supply the demonstration. The ingenuity of experienced jailers is sufficient, surely, to prevent the successful movement of contraband from hand to hand while the officers are on the spot.[36] As to the threat of arguments and conflicts, this is always present, and subject to stern control, in the jailhouse. Prisoners may become disagreeable, or even violent, anywhere—at the meal table, at play, in the TV room. When that happens, authority must be asserted. If necessary, the prisoner must be moved away from the place of disturbance. But the possibility of disturbing behavior does not justify exclusion from the place where it may happen—from the dining area, TV room, etc. At least until or unless respondents can show a pattern of violence or other disruptions taxing the powers of control—a kind of showing not remotely approached by the Warden's expressions—the security argument for banishing inmates while their rooms are searched must be rejected.

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[36] Respondents point to testimony that an officer once intercepted a package of marijuana being thrown by one inmate to another when he observed the search team approaching the unit. This is beside the point, of course; the alleged incident was not prevented by the procedure here in question, and there is no basis for finding that recurrences would become more probable if inmates could observe after the search party arrived and went to work.

In so holding, this court follows the high authority of Judge Lasker in *Giampetruzzi* v. *Malcolm*, 406 F.Supp. 836, 844-45 (S.D.N.Y. 1975).[37] Following that precedent with respect to pre-trial detainees, this court refrains from extending it to convicted inmates. The wisdom of removing *any* prisoner from his quarters during a search may well be questioned. If, as this court now holds, the practice is to be forbidden for pre-trial detainees, respondents may wish to reconsider it for others. Nevertheless, confining itself to the sharp limits of its powers, the court is unable to conclude that the procedure is "unreasonable" in Fourth Amendment terms for convicted inmates. For them, the asserted necessities need not be "compelling." While the Warden's explanation of the position is not overpowering, it is certainly not weightless. For the treatment of sentenced inmates, it passes the constitutional test.

G. PERSONAL PROPERTY

In a society which holds property more sacred than perhaps it should, a person's identity and self-respect are deeply entwined with material possessions. We are accustomed to prize as basic necessities an array of balms, toys, and physical amenities that people in a simpler age knew or cared nothing about. It becomes a severe discomfort, to say nothing of self-respect and security, to do without a watch, ac-

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[37] The inmates in the cited case were pre-trial detainees specially classified as "security risks." In that respect, the petitioners herein have a stronger claim.

customed gadgets, cosmetics, minor items for personal adornment, things to eat, drink, smoke, and chew without regard to nutrition or necessity in the sense of survival. The strong dependence upon material things as assurances that we exist gives rise to one of the deepest miseries of incarceration—the deprivation of familiar possessions ranging from the dwelling place to its furnishings to automobiles, a wardrobe, however modest, and other paraphernalia supporting life in freedom for most of us.[38]

This aspect of incarceration is notably severe in the MCC. In contrast with its early billing as a showplace, conformably to the habitual stance of the Federal Bureau as a leader of penal enlightenment, the MCC's rules and practices governing possessions allowed to inmates have been markedly more restrictive than those in numerous state facilities, including a number of highly secure prisons. Petitioners have attacked these rules and practices. The attacks have in some respects been found to be well grounded.

1. *Confiscating property.*—When this case began respondents claimed and exercised the powers to search an inmate's cell, barring any opportunity for the occupant to see what was happening; to seize property upon an officer's deciding it was "contraband;" to give no receipt or other account of what was seized; and to keep the property permanently, ostensibly for "The Government" but with no way in

[38] See G. Sykes, *The Society of Captives* 67-70 (1958): E. Goffman, *Asylums* 20 (1961).

fact for anyone ever to know or question what had actually happened to it.[39] This regime of absolute and unquestionable tyranny was not softened by a sweeping definition of "contraband," which purported to embrace "any item or article inside an institution that was not issued by the institution, purchased in the commissary, purchased through approved channels or approved for issue by an authorized staff member." [40] On a motion for summary judgment, the

[39] Property, except for currency, which is seized as contraband is generally supposed to be turned over to the Chief Correctional Officer and destroyed under his supervision. On occasion, seized property is returned to an inmate's family or turned over to appropriate law enforcement officials. Currency seized by the respondents is supposed to be deposited in a Miscellaneous Fund maintained by the Department of the Treasury, and is not returned to the inmate from whom it was taken.

[40] The quotation is from the Bureau's Custodial Manual, Policy Statement 2001.1B, § 702, which reads more fully as follows:

> "1. Contraband may best be defined as any item or article inside an institution that was not issued by the institution, purchased in the commissary, purchased through approved channels or approved for issue by an appropriate staff member. Authorized items may be considered contraband when found in excess quantities, or altered from original status.
>
> "2. The following items shall always be considered contraband, within any federal penal or correctional institutions:
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> "a. Guns and firearms of any type.
> "b. Ammunition, explosives.
> "c. Knives and tools not provided [according to regulations].

[Footnote continued on page 160a]

court ordered that respondents give receipts for seized property, 428 F.Supp. at 342, a step that might have led respondents to supply some explanation for the seizure and some opportunity to contest it. Respondents continue to insist, however, that there will be and need be no procedure by which an inmate can question the taking of property on an officer's pronouncement that it is "contraband." Petitioners are entitled to have this stance corrected, for it is, in the most severe and unrelieved terms, an assertion of power to take property without due process of law.

It should not be necesary, though it evidently is, to affirm in 1977 that federal prisoners, and most obviously confined people who have been convicted of nothing, are protected by the Fifth Amendment against takings of things in their possession without at least some chance to dispute the action and to justify the possession. *Wedle* v. *Director, Patuxent Institution*, 405 U.S. 1036, 92 S.Ct. 1318, 31 L.Ed.2d 577 (1972), vacating and remanding 436 F.2d 342 (4th Cir. 1970), for consideration in light of *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972); *Sell* v. *Parratt*, 548 F.2d 753, 757, 759 (8th Cir. 1977), cert. filed No. 76-1339 (March 28, 1977); *Kimbrough* v. *O'Neil*, 523

[40] [Continued]

"d. Hazardous and poisonous chemicals and gases.

"e. Narcotics and drugs. These can be dispensed and in the possession of offenders only as authorized by the institution medical department.

"f. Intoxicants, such as liquor and alcoholic beverages.

"g. Currency, where prohibited."

F.2d 1057 (7th Cir. 1975), aff'd on reh. en banc, 545 F.2d 1059 (1976); *Russell* v. *Bodner*, 489 F.2d 280 (3d Cir. 1973). Robustly opposing that proposition, respondents sound some chilling notes. There is no need for any opportunity to contest the confiscation, they say, because:

> "[i]f the confiscation of a particular item is improper, the inmate has an adequate remedy in a common law action for reverter or conversion as well as a constitutional action for damages under the Fifth Amendment." [41]

If that were an answer, every official, high or low, could enjoy it as justification for lawless confiscations. The assertion is, moreover, uniquely astonishing when made by an agency that should normally be heard to insist upon exhaustion of its own administrative remedies before complainants haul it into court. Enough has been said to indicate why the court must regret and reject the proposal of high federal officers that their conduct be tested in state courts by the quiddities of old common-law writs.

This court holds that respondents must afford an inmate some method of contesting a confiscation. The procedure need not be elaborate, certainly nothing like a case for reverter or conversion. In most situations, there will probably be no need for any semblance of a hearing. But procedures must exist providing for at least the following:

[41] Respondents' Post-Trial Memorandum 216.

(a) A brief statement to the inmate of the asserted justification for the seizure.
(b) A notice of the right to respond in some reasonably simple and convenient fashion and assert grounds, if any, why the seizure is claimed to have been unwarranted.
(c) Some suitable opportunity to meet and answer controverted evidence throught to warrant confiscation.
(d) A decision, with reasons, however brief.

Mindful here and throughout that it is respondents who are primarily responsible for the MCC's governance, the court will not now prescribe the procedures in detail. The decree will require that they serve and file new procedures conforming to the directives outlined above, on the 90-day timetable, with 15 days for objections, prescribed earlier.

2. *Packages.*—MCC inmates are forbidden to import or receive packages of food or things like watches, radios, and sweat shirts, except for one Christmas package, though items of this nature may be purchased from the commissary. This restriction is sought to be justified on the present record by "dire predictions" which are not only unsupported by evidence, cf. *Goodwin* v. *Oswald*, 426 F.2d 1237, 1244-45 (2d Cir. 1972); *Rhem* v. *Malcolm*, 371 F. Supp. 594, 626 (S.D.N.Y.), aff'd and remanded, 507 F.2d 333 (2d Cir. 1974), but in several instances belied by experience or by respondents' own self-contradictions.

The record herein and the law books reveal repeated instances where prisons, often housing con-

victed inmates under close security, allow (or have been ordered to allow) the receipt of packages and the ownership of personal property more extensive than the MCC permits. See, e.g., *Feely* v. *Sampson*, Civ. Action No. 75-171 (D.N.H., Sept. 14, 1976); *Giampetruzzi* v. *Malcolm*, 406 F.Supp. 836, 842 (S.D. N.Y. 1975); *Miller* v. *Carson*, 401 F.Supp. 835, 840 (M.D.Fla. 1975); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F.Supp. 676, 693 (D.Mass. 1973), aff'd, 494 F.2d 1196 (1st Cir.), cert. denied *sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 189 (1974); *Moore* v. *Janing*, Civ. No. 72 0 223 (N.Neb., March 8, 1973); *Bishop* v. *Lamb*, LV-1864 (D.Nev., Aug. 27, 1973). So, for example, inmates in New York State institutions may receive a 35-pound package of food each month, in addition to clothing and magazines. New York State prisoners may also possess electric razors, typewriters, and stationery.

The evidence of what is done elsewhere is not controlling upon respondents. But it does call upon these administrative experts to make some reasoned showing, surely for unconvicted people, as to why there must be deprivations at the MCC so much harsher than deemed necessary in other institutions. *Procunier* v. *Martinez*, 416 U.S. 396, 414, n.14, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Moskowitz* v. *Wilkinson*, 432 F.Supp. 947, 951 (D.Conn. 1977). Respondents have made no such showing. Their restrictive rules in this light must be held to be arbitrary and capricious,

not merely as to pre-trial detainees, but as to all those in the Center.

The compelling drive toward this conclusion becomes more palpable against the justifications respondents offer. They invoke, as everywhere, the claims of security: weapons, drugs, and whatnot will enter in packages. But there has been not even an attempt to show why protective measures, familiar in use at other institutions, could not serve here.

Then it is urged that allowing personal property in jail will "provide the materials for buying favors among inmates or between inmates and staff, for gambling activities, and for the use of strong-arm tactics and other similar types of activities which are well-known and of real concern to correctional administrators * * *." [42] Similarly, respondents profess to worry about thefts, conflicts, and "aggravating the factor of economic inequality * * *." [43] These are not more solid than other ghosts, and respondents themselves help to prove it. The commissary offers items of substantial cost—e.g., $18 sneakers and $27 radios—serviceable for favors, for demonstrated inequalities, and other possibly baleful uses.[44] Apart from that, we all are, or ought to be, aware enough of past and present concentration camps to know that crumbs and scraps are enough to evoke propensi-

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[42] Id. 211-212.

[43] Id. 212.

[44] Commissary arrangements present issues of their own, considered and decided below.

ties toward bestiality and mutual exploitation.[45] Petitioners may have allowed themselves to soar a little when they attack respondents' "pseudo-socialist principles." [46] The fact remains that it only demands a pseudo-equality to insist that all must be deprived arbitrarily, however much greater the deprivations of some than of others.

Respondents also urge that packages will bring "sanitation and storage problems * * *." [47] Again, this is inconsistent with their own purveying of food that may attract vermin and require storage. Moreover, if packages are to be allowed, as they will be by this court's order, there is no doubt about respondents' authority to control volume, the nature and management of food, and other factors of genuine concern for decent housekeeping.

Finally, some note must be taken of the argument that for inmates serving sentences "the restrictions on the possession of personal property also serve the legitimate purpose of punishment." [48] This is a curious argument indeed. Most of us in the federal law business associate respondent Director Carlson with a good deal of penological wisdom extending well beyond, but surely including, the maxim that people are sent to prison *as* punishment nor *for* punishment.

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[45] See, e.g., A. Solzhenitsyn, *One Day in the Life of Ivan Denisovich* (1963).

[46] Petitioners' Post-Trial Memorandum 374.

[47] Respondents' Post-Trial Memorandum 212.

[48] Id. footnote **.

A fortiori, the acknowledgment that defendants awaiting trial, and not lawfully subject to any punishment, are being punished in this way is a substantial confession of error, whether calculated or not. And it is, furthermore, a declaration that jailers are determining forms of punishment with no suggestion that their statutory powers were meant to embrace that profound responsibility.

The court concludes, in sum, that respondents have failed to offer any but arbitrary and unacceptable grounds for their stringent limitations upon personal possessions. Upon the record before the court, it seems clear that inmates should be free to retain or receive at least items of the kind available on order from the commissary. Once again, the precise details are primarily for respondents to formulate. As in the case of regulations concerning confiscations, and on the same terms and timetable, respondents will prepare and submit suitable regulations governing this subject.

H. CLOTHING

Inmates at the MCC are not permitted to wear their own clothing except for sweat clothes and footgear on sale from the commissary. At the Receiving and Discharge Unit, they are issued underwear and jumpsuits. The jumpsuits are brightly colored—red, orange, yellow, and blue. The suits frequently do not fit. In fact the supposed flexibility of jumpsuits—in size and interchangeability between men and women—is one reason the respondents give for using

these uiforms. Inmates complain that the suits are often wrinkled and sometimes torn. It is awkward to use the toilet while wearing them.

Inmates testified that the uniforms are "degrading," "dehumanizing," "depersonalizing," "an embarrassment." Some found them most distressing during visits, feeling embarrassed to have their families and friends see them in what they referred to as "clown suits," "monkey suits," or "Santa Claus suits." Petitioners' experts testified that requiring inmates to wear uniforms such as these is psychologically destructive, a "negation of their individuality." On the other hand, an expert called by respondents testified he wore one of the jumpsuits for 10 hours and did not find it degrading.

It is easy to be skeptical, even cynical, about the testimony *pro* and *con* concerning the psychological impact of MCC jumpsuits. For a litigious inmate, the idea of "degradation" or embarrassment may roll trippingly off the tongue. For a visiting expert, headed for freedom and privacy after the day's work, it is no feat to feel at ease in the very temporary garb assumed for an unreal experiment.

It has proved useful, therefore, to have the benefit of several periods of direct observation. The evidence of the court's eyes has tended to sustain petitioners' contentions. The jumpsuits are in fact garish. The MCC's personnel in charge of fitting will win no awards. The inmates are often discovered in uniforms several sizes too large, looking funny in a way likely to amuse only others. There is every reason

for the court to credit the reports of discomfort, embarrassment, and felt stigmatization, not least in the reflection seen in the eyes of visiting family or friends.

Without much defending the uniforms on sartorial grounds, respondents urge the necessity for this attire to distinguish inmates from others and thus promote the jail's security. The argument is unsupported by substantial evidence or plausible reason. Security in the MCC is elaborate; there are possibilities of escape, but they are almost negligible. Most inmates are confined to the unit for nearly 24 hours a day. While this may change, as the court hopes, there remains an impenetrable outer perimeter, defended by TV screens, double sets of doors, a closely guarded corridor, and extensive communications devices. Nobody enters without the invisible ink stamp. Nobody leaves without displaying it.

In the face of these facts, the requirement of uniforms rests upon foundations so tenuous as to be arbitrary and capricious. For pre-trial detainees, the best of uniforms is a dubious restriction. There is wide acceptance of the U.N. Standard stating: "An untried prisoner shall be allowed to wear his own clothing if it is clean and suitable." U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 88(1). Whether or not the Federal Bureau can manage to attain that standard, endorsed by many nations much less wealthy, it cannot justify compelled dress in a costume understandably experienced as humiliating in addition to its qualities of physical discomfort. As for sentenced prisoners, it is by now

a matter of minimum decency that prisoners should, subject to security requirements, be "entitled to choose any * * * clothing they wish," ABA Standards § 6.7, or at least, where uniforms are required, be given clothing which "shall in no manner be degrading or humiliating." U.N. Standards, *supra*, Rule 17(1).

The practice of taking inmates' underwear and replacing it with government issue, often used, is altogether indefensible, and is not noticeably defended.

Upon the findings and conclusions thus outlined, the court will order as follows with respect to clothing:

(a) Pre-trial detainees will be permiteed to wear their own clothing unless they volunteer to wear uniforms issued by the MCC. *Accord*: *Forts* v. *Malcolm*, 426 F.Supp. 464, 468 (S.D.N.Y. 1977).

(b) Uniforms for men shall consist of shirts, slacks, and other conventional items. Uniforms for women shall consist of (i) dresses, (ii) blouses with skirts or slacks, or (iii) other items of standard apparel.

(c) Sentenced inmates will either be permitted to wear their own clothing or, unless they volunteer to wear one of the existing supply of jumpsuits, will be issued uniforms of the kind prescribed in"b," *supra*.

(d) Issued clothing will fit the wearer with reasonable accuracy.

(e) Inmates may wear their own undergarments or be issued new ones.

These provisions, given the limits of the court's expertise in matters of dress, are subject to reconsideration and modification upon due notice and hearing.

I. FOOD

Menus at the MCC are organized in 30-day cycles. The meals are prepared in the main kitchen up to a day in advance and refrigerated. At meal times, the trays are sent up to the living units, where they are reheated in microwave ovens.

The meals are nutritionally adequate. In quantity, variety, and palatability, they compare not unfavorably with the food produced in other large institutional kitchens. Respondents, with certain exceptions to be noted below, take suitable pains with this basic aspect of life in or out of confinement.

Petitioners have, however, pressed a list of complaints about food. They assail the cooking and heating procedures; they want meals more wholesome and attractive; they demand more attention to the varieties of individual tastes; and they urge the need for more suitable personnel, including outside civilians to replace some or all of the inmates who work in this aspect of the MCC's operations. Having heard the evidence and observed more than once the preparation and service of meals, the court rejects all of these demands as unfounded both in fact and in law.

One complaint, however, relating to sanitation, will be sustained. Respondents have been notably and persistently lax in allowing inmates to cook and serve

food with luxuriant hair uncovered and bare hands. There is no excuse for this, and respondents offer none. The laxity has been open, notorious, and almost entirely unrelieved. Respondents have arbitrarily and inexcusably neglected their duty in this respect. They will be ordered to make and enforce appropriate regulations.

J. DISCIPLINE

The amended petition in this case attacked numerous aspects of respondents' disciplinary procedures. Virtually all of these charges were dismissed at the end of petitioners' case-in-chief on the authority of *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The only issues remaining concern the manner in which "administrative detention" is imposed at the MCC and the conditions under which administrative detention and disciplinary segregation are carried out.

1. *Administrative detention.*—Respondents' policies with respect to inmate discipline are set forth in MCC Policy Statement NY7400.5D (4-5-76). The Policy Statement defines "Administrative Detention" as

> "the status of confinement which results in a loss of some privileges which the inmate would have if assigned to the general population. Generally a person placed in Administrative Detention will be locked in his or her own room on the unit where he or she is normally assigned. Persons assigned to open dormitories will have to be transferred from their units to 9-South [the

maximum security unit] when it is determined that Administrative Detention is required." ¶ 11a [49]

The occasions for administrative detention are defined as follows:

> "An inmate may be placed in Administrative Detention when his attitude and conduct indicate that his continued presence in the general population poses a serious threat to life, property, himself, staff, other inmates or to the security of the institution, and when the inmate:
>
> "(1) Is pending a hearing for violation of institution rules or regulations;
>
> "(2) Is pending an investigation of a violation of institution rules or regulations;
>
> "(3) Is pending investigation or trial for a criminal act;
>
> "(4) Requests admission to Administrative Detention for his own protection or the staff determines that admission to or continuation in Administrative Detention is necessary for the inmate's own protection.
>
> "(5) Is pending transfer or is in holdover status during transfer; or
>
> "(6) Is pending classification or the gathering of information on the nature of an individual's offense, bail and prior record." ¶ 4(a).

[49] "Disciplinary Segregation" is

> "the status of confinement of an inmate housed in an individual cell, either by himself or with other inmates, separated from the general population, as a result of a hearing before the Institution Discipline Committee in which the inmate has been found to have committed a prohibited act. Inmates in Disciplinary Segregation will have significantly fewer privileges than those housed in Administrative Detention * * *." ¶ 11b

The Policy Statement further provides that administrative detention may be ordered "by Correctional Supervisors, shift supervisors, or members of an inmate's unit management team (Unit Manager, Correctional Counselor, Case Manager). The Correctional Supervisor of the Watch must be notified immediately when an inmate is placed in Administrative Detention." ¶ 11(a)(1).

Under Bureau-wide "minimum standards," an inmate charged with misbehavior must be given "a written copy of the charges against him within 24 hours of the infraction," and a hearing must be held within 48 hours (excluding weekends and holidays) of the incident. ¶ 8(a), (b). The unit management team must "formally review the status of each inmate who spends seven (7) continuous days in Administrative Detention and thereafter such cases will be reviewed on the record each week and will be formally reviewed at least every thirty (30) days." ¶ 11(a)(2).

Petitioners charge, and the court finds, that respondents have not complied fully with their own policies concerning the imposition of administrative detention. One inmate was placed in administrative detention (for "malingering") for a period of ten days before a hearing was held, at which hearing he was acquitted of the charge. This same inmate was on another occasion placed in administrative detention pending hearing on a charge of "attempted es-

cape." The hearing did not take place for approximately eight days after the incident (during which period the inmate was locked in), and then the inmate was acquitted.

Another inmate was placed in administrative detention for four days on a charge of possessing a marijuana cigarette, after which he was released without a hearing. Another spent three or four days in detention without a hearing for "unauthorized use of the telephone." The Associate Warden ordered a female inmate locked in because of her "negative attitude" some twelve hours after an incident on the women's unit. She was released four hours later.

At an earlier stage in the case, this court ordered the release of an inmate who had been held for 30 days in administrative detention "for his protection" without his consent.

The instances just reviewed involved disregard of the agency's own standards governing preferment of charges, the grounds for detention in a locked cell, and the appropriate speed for deciding charges on which such detention is predicated. However, the few cases are not enough to constitute a pattern or practice. And the affected individuals are not seeking specific relief for themselves. Nevertheless, it bears repetition that the agency is bound by its own regulations. The court and all affected persons are entitled to expect that those in charge, especially upon notice that violations have occurred, will take suitable measures to enforce compliance. These reminders, the court concludes, are enough on this subject for the time

being. It is to be expected that respondents will scrutinize with care and duly implement their controlling policies limiting administrative detention to cases of genuine necessity, limiting the categories of officials who may impose it, requiring prompt notice of charges, and holding prompt hearings for inmates subjected to this form of harsh treatment.

2. *Exercise during confinement.*—The Policy Statement quoted above sets forth in detail the conditions under which inmates are to be confined either in administrative detention or disciplinary segregation. It says, ¶ 11(a)(3):

> "*Conditions of Administrative Detention.* The basic level of conditions as described below for Disciplinary Segregation will also apply to Administrative Detention. To the extent possible, inmates housed in Administrative Detention will be afforded the same general privileges given to inmates in general population as is consistent with existing resources available and the security needs of the unit. Unless there are compelling reasons to the contrary, commissary privileges, reasonable amounts of personal property, and exercise periods exceeding those provided for inmates housed in Disciplinary Segregation will be provided. Visiting and correspondence privileges of the general population will be given inmates in Administrative Detention."

This should mean, *inter alia*, that people in administrative detention will normally have a daily hour of outdoor exercise plus the kinds of physical workouts possible with equipment in the units. On the other hand, inmates in disciplinary segregation are said

to be entitled to at least two one-hour or four half-hour periods of exercise per week. ¶ 11(c)(6).

Despite what is written, the record shows that inmates in administrative detention frequently receive no more, and sometimes have less, exercise time than is required for those in segregation. While this is another case of reminding respondents to do as their own rules require, the reminder is appropriately to be embodied in the decree. For the Policy Statement, like the law more generally controlling, says that only "compelling reasons to the contrary" can justify loss of "existing privileges" for people in administrative detention. It is suitable, therefore, to specify that this parity will be observed unless "compelling reasons," reported to the inmate in writing, are deemed to justify a departure.[50]

3. *Religious observances.*—Inmates in segregation may be denied permission to attend religious services. They are, however, permitted to receive visits from a clergyman of their faith. It is clear that this kind of restriction may lawfully be imposed in the exercise of "a reasonable judgment" appraising the individual inmate against the security and safety needs of the institution. *LaReau* v. *McDougall*, 473 F.2d 974, 979 (2d Cir. 1972), cert. denied, 414 U.S. 878, 94 S.Ct.

[50] As quoted earlier, ¶ 11(a)(3) is also qualified in stating that equal privileges are to be afforded "[t]o the extent possible * * * [and] as is consistent with existing resources available and the security needs of the unit." For purposes of the court's decree, limitations to be imposed under this language will be treated along with "compelling reasons," that is, they will be given to the inmate in writing.

49, 38 L.Ed.2d 123 (1973). There is no evidence in the record that respondents are administering this discretion in an arbitrary fashion, or, in fact, that they have ever exercised it at all. The petitioners have proved no valid grievance on this subject.

4. *Women's lock-in.*—The women's unit on 5-South of the MCC consists of single rooms which have sinks but no toilets. These rooms were originally designed for people expected to be on work-release, in a kind of "halfway house" status; they were never intended as places for locked detention. The women are not locked in at night, as are the men, and may use the toilets located at the end of each corridor. When a woman is placed in segregation, however, or the entire unit is locked in for some reason, the inmates are dependent upon the guards to check periodically whether any of them need to use the toilet.

The guards are of varying conscientiousness with respect to this duty. Inmates have been locked in for many hours without being released to use the toilet. It appears that sinks have done service as toilet bowls when an extended banging on the door failed to attract a guard. Apart from this kind of unpleasantness, it falls today below an acceptable level of humaneness to confine a prisoner of any sex where he or she must solicit freedom to use a toilet.

The cases in which courts have considered and condemned locked cells without toilet facilities have usually involved generally barbarous conditions (of filth, vermin, cramped quarters, etc.) markedly inferior to those in the MCC. See, e.g., *Wright* v. *Mc-*

Mann, 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885, 93 S.Ct. 115, 34 L.Ed.2d 141 (1972); *Kimbrough* v. *McNeil*, 523 F.2d 1057 (7th Cir. 1975); *Taylor* v. *Sterrett*, 344 F.Supp. 411 (N.D.Tex. 1972), aff'd in part, rev. in part, 499 F.2d 367 (5th Cir. 1974), cert. denied, 420 U.S. 983, 95 S.Ct. 1414, 43 L.Ed.2d 665, reh. den., 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed. 2d 463 (1975). It is a small and justified step from those decisions, however, to hold unacceptable for locked confinement even an otherwise decent cell that lacks a toilet. This court so holds. For sentenced prisoners, the condition must be barred today as cruel and unusual punishment. For pre-trial detainees, it denies due process. For both, the court's decree will forbid the further use of cells without toilets for lock-ins.

K. STAFF

Petitioners claim that the staffing patterns at the MCC are constitutionally unacceptable. Specifically, they contend that the institution is understaffed, thereby endangering inmates; and, further, that a "sex blind" policy of staff assignments improperly results in male staff on the women's unit, and vice versa.

1. *Number of guards.*—During the day and evening hours (until midnight), one correctional officer is assigned to each modular living unit on Floors 5, 7, 9, and 11.[51] During the "morning watch" (mid-

[51] The inmates of the honor unit are the cadre who work throughout the building. There is one guard on duty in this unit during the day shift only. Unit 3, protective custody, has one guard on duty 24 hours a day.

night to 8:00 a.m.) one officer is assigned to an entire floor, i.e., two living units. The day and evening officers are responsible for a considerable list of duties in addition to supervising the unit: sick call, visiting, search, meals, and some other activities are among the responsibilities of this officer. Frequently, the officer must leave the unit to escort inmates. Petitioners contend that because of the number of functions this one officer must perform for the 48 inmates on the unit (60 in the dormitory under today's decision reducing the number from 120), he or she is unable to perform any of them efficiently, so that there are long delays in the delivery of service to the inmates and threats to their safety.

From midnight to 8:00 a.m., the single guard must divide his time between the two units on each floor. On all except the women's and honor units, the inmates are locked into their rooms, which have no mechanism for attracting the guard's attention. Therefore, inmates needing the guard—because they are sick, for instance—must pound on the door until the guard hears them.

Respondents argue that the nature of the MCC renders it simpler and safer to guard than the average institution, and that the evidence shows that the "staff has not only fully performed its duties in a professional manner, but has contributed significantly to the relaxed atmosphere of the institution." [52]

[52] Respondents' Post-Trial Memorandum 265.

Courts have not hesitated to require penal institutions to assign and/or hire more staff when it appeared that understaffing endangered the well-being of the inmates. See, e.g., *Jones* v. *Wittenberg*, 330 F. Supp. 707, 715 (N.D.Ohio 1971), aff'd *sub nom. Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972); *Tyler* v. *Pereich*, 74-40-C(2) (E.D.Mo., October 15, 1974); *Incarcerated Men of Allen County* v. *Fair*, Civ. No. C 72-188 (N.D.Ohio, May 23, 1973); *Alberti* v. *Sheriff of Harris County*, 406 F.Supp. 649, 678 (S.D.Tex. 1975); *Miller* v. *Carson*, 401 F.Supp. 835, 895-97 (M.D.Fla. 1975); *Hamilton* v. *Landrieu*, 351 F.Supp. 549, 551-52 (E.D.La. 1972); *Jackson* v. *Hendrick*, 1971 No. 2437 (Pa.Common Pleas, April 7, 1972); *Sandoval* v. *James*, No. C-72-2213 RFP (N.D.Cal., October 3, 1975); *Joiner* v. *Pruitt*, No. 475-166 (Lake Cy. Ind. Sup. Ct., February 21, 1975); *Rhem* v. *Malcolm*, 371 F.Supp. 594, 628 (S.D.N.Y.), modified 507 F.2d 333 (2d Cir. 1974); *Hedrick* v. *Grant*, Civil No. S-76-162 (E.D.Cal., November 13, 1976); *Mitchell* v. *Unteiner*, 421 F.Supp. 886, 901 (N.D.Fla. 1976). It remains clear, however, that the judgments of those who run the prisons carry great weight on questions of this sort, and that a powerful case must be made for substitution of judicial judgment.

In this light, the court is not convinced that the institution should be held to be understaffed. On the day shift, the unit officer is not actually alone; each unit has a staff of three to four persons (unit manager, correctional counselor, caseworker and/or secretary) who are in the living units a good part of the

time. Petitioners have not shown that inmates are in any way jeopardized by the current staffing pattern for the 16 or so hours each day when they are not locked in. There is no evidence of violence, or threats of violence, which could be prevented by additional guards, or for which there is an urgent need to add guards. Cf. *Miller* v. *Carson, supra; Incarcerated Men of Allen County, supra; Sandoval* v. *James, supra.* It might be desirable on the unit, but petitioners have not demonstrated that the existing arrangement falls below a minimum enforceable by the court.

The question concerning the morning watch is closer. Inmate witnesses testified to the difficulty of attracting a guard's attention if one is needed at night. The solid cell doors and the lack of any call system by which guards can be alerted that an inmate needs them corroborate this testimony. While these assertions are not to be discounted, it is also true that no case was shown of any serious hurt or discomfort resulting from delay in raising a guard. The officer patrolling two units at night, when most of the inmates are asleep and locked in, has a relatively short distance to cover and a total of approximately 100 people to attend. The officer is expected to move about through the two units. The trip is not a long one. Unless the guard is asleep or indolent, a charge that has not been made, the tour through both units requires a very few minutes.

Upon the evidence in this record, the court cannot agree that two guards are, by any judicially enforce-

able standard, required for the performance of this assignment.

2. *Assignment by sex.*—Respondents hire and assign correctional personnel without regard to sex. Because of the practice of assigning one correctional officer to a unit, as discussed above, this policy frequently results in having a guard alone on a unit of inmates of the opposite sex. "Such staffing patterns," petitioners assert, "create the danger, recognized by the experts and inmates, of sexual relations, possibly without consent, between staff and inmates" as well as other "unwelcome intrusions" into inmates' privacy.[53]

The National Sheriffs' Association declares as a standard that "[n]o male employee or visitor will enter the female quarters in the jail unless advance notice is given and escort service provided by a female jail supervisor. Where there are women in the jail population a female supervisor is required to be on duty." See National Sheriffs' Association, *A Handbook on Inmates' Legal Rights*, Special Note at 3-4 (1974). *Jail Standards* (1977), proposed by The Nebraska State Bar Association Committee on Correctional Law and Practice, would forbid any "male facility personnel [to] enter [a] female inmate's living area, except in an emergency, without female facility personnel present." § 5-(7) at 75. See the similar provision in Rule 53, United Nations Standard Minimum Rules for the Treatment of Prisoners

[53] Petitioners' Post-Trial Memorandum 426.

(1975). The cited standards enforce strong traditions, certainly familiar to a substantial portion of today's judicial personnel. And there is case law to the same effect. See *Forts* v. *Ward*, 434 F. Supp. 946 (S.D.N.Y. 1977); *Hamilton* v. *Love*, 328 F.Supp. 1182, 1195-96 (E.D.Ark. 1971); *Hamilton* v. *Landrieu*, 351 F.Supp. 549, 551 (E.D.La. 1972); *Obadele* v. *McAdory*, Civ. No. 72J-103(N) (S.D.Miss., June 19, 1973).

The subject lies, however, in a sector of the community's mores where the state of flux is uniquely notable. The value placed upon privacy, as against unwanted intrusions by members of the opposite sex, remains high. But the particular concern for *female* inviolability, and the corresponding neglect of comparable male interests, is already somewhat anachronistic. To be sure, biological and cultural factors continue to make it a fact that violent sexual assaults are almost exclusively forms of male aggression. On the other hand, it was common knowledge long before Catherine the Great, to say nothing of the more recent portrayal by Wertmuller in the film *Seven Beauties*, that females may employ positions of power for sexual exploitation of males. Rational prison management, like other forms of social control, should reckon with such realities.

In the last analysis, however, the overriding facts may well be the phenomena of uncertainty and change. And these counsel a tentative and gingerly approach by the judges. The community's standards are obvi-

ously prime concerns in deciding how to regulate contacts, relationships, and exercises of authority between people of opposite sexes. Judges are not by office or training specially qualified as the regulators.

Moreover, since rules and standards in this area affect selection and assignment of correctional employees, prescriptions in terms of sex confront powerful policies opposed to discriminations in employment based upon sex. Civil Rights Act of 1964, Title VII, 42 U.S.C.A. § 2000e *et seq.*; *Dothard* v. *Rawlinson*, —— U.S. ——, 97 S.Ct. 2748, 53 L.Ed.2d —— (1977).

We approach, then, in a setting of fluid and sometimes conflicting values, petitioners' contention that correctional officers should be people of the same sex as the inmates in the unit. The position is grounded upon some evidence of affronts to privacy. For the most part, the female petitioners are the main complainants in this aspect of the case. They charge, and the court finds, that male guards have been casual about walking into the rooms of female prisoners without allowing time for the occupants to arrange to be fully dressed. While the male officers are expected to knock first, and generally do, they have neglected to wait scrupulously for long enough to make the heralding effective.

Nor has this problem been faced only by female inmates. A male inmate testified to a female officer looking in on him while he was on the toilet. And during one of the court's tours, a female guard matter-of-factly led us, without warning the occupants, into a men's washroom and toilet facility. No consternation ensued. It is not possible, at any rate, to find out from a record otherwise bare on this score how common invasions of this type may have been.

There is no evidence at all on the present record of sexual abuse of inmates by correctional personnel. The court cannot proceed in this aspect on rumors or on judicial notice. If we did, we could scarcely emerge from the maze to which the topic leads. After all, the main literature and experience of sexual assaults in prison does not treat of heterosexual misbehavior. Were assault the main concern, having guards and prisoners of the same sex would not solve the problem.

Upon the evidence in this case, and upon the pertinent grounds of judgment and the judicial limitations suggested above, the court deems this a matter for minimal relief. Whatever different views may evolve as matters of social and legislative policy, there are no sufficient grounds for the broad commands petitioners seek. The court will not order the segregation of correctional personnel to match the sexes of the inmates. Neither the evidence nor general facts that might be judicially noticed warrant an order so drastic and confining. See *Dothard* v. *Rawlinson, supra*, at —— n.23, 97 S.Ct. 2748; *Sex Segregation of American Prisons*, 82 Yale L.J. 1229, 1241 (1973).

On the other hand, respondents must ensure more effectively than they have that the elemental requirements of inmates' dignity and privacy are observed. Suitable regulations (and the court's decree) must

forbid entry into rooms or bathroom facilities by officers of the opposite sex unless (a) there has been sufficient warning or (b) emergent necessity justifies an exception. Suitable discipline—preferably by respondents, but by the court if necessary—will attend violations of these rules.

While the court should and will order no more at this time, the question must be deemed an open one as facts and attitudes continue to shift over time. If today's very limited directions prove insufficient to assure simple decency, a closer approach to petitioners' view may come to be required. On this, as on other topics, however, it is to be hoped that flexible adaptations by the people with day-to-day power and responsibility will limit or obviate further interventions by the court.

I. ADMISSIONS AND TRANSFERS

1. *Admissions.*—All inmates entering or leaving the MCC are processed in the receiving and Discharge Unit ("R&D"). An inmate first assigned to the institution for confinement has his or her own clothing taken away (a practice to be modified under today's decision) and is given a uniform. The street clothes are kept in R&D and are reisused for visits outside the institution, with the process being reversed on return.

Petitioners complain that the delays upon processing on a first admission to the MCC are excessive, and that this is such a grievous default in the critical

time of initial confinement as to require correction by the court. The evidence on this subject is not persuasive that there are delays so unreasonably long as to justify the court's intervention.

2. *Court visits.*—There are further complaints concerning delays in the short journey required from the MCC to this courthouse as well as other courts in the area for which MCC is a place of confinement. It is obvious that long waits in holding pens and similarly unpleasant places, following premature wake-up times and other oppressions, can interfere with an inmate's effective participation in his pending case, and may require judicial correction. *Alberti* v. *Sheriff of Harris County*, 406 F.Supp. 649, 663, 688 (S.D.Tex. 1975); *Dillard* v. *Pitchess*, 399 F.Supp. 1225, 1237 (C.D.Cal. 1975). In the present record, however, the court finds no credible evidence of undue delays reaching the level of constitutional or other wrongs. It is to be hoped and expected that respondents will make best efforts to see that inmates are brought to and from the court with all convenient speed. Particular judges, in the exercise of general powers of supervision and in the administration of their own cases, may find occasions to issue orders on this subject. The record does not support, however, the issuance of any general form of injunctive relief on this subject.

3. *Transfers.*—When this case began, inmates at the MCC awaiting assignment to more permanent places for the service of their sentences were frequently moved with harsh and inconsiderate abrupt-

ness. The practice was to post bus lists for such transfers in the evening preceding an early morning departure. The list was sometimes not posted until after the inmates had been locked into their rooms for the night. In either case, these notifications were so late that it often became impossible for an inmate to notify family, friends, or counsel before precipitate removal to a different institution, often a long distance away.

While this practice was not defensible, it failed somehow to be included in the ambitious list of grievances set forth in the original and amended petitions, and it came to be a subject of debate only during the course of trial. When the undisputed facts were presented, and when the court gave informal intimations of a view adverse to respondents', the latter proceeded to make substantial revisions in their practices. It has now been declared by respondents that notice of a transfer will be given as soon as the designation has been made, and, in all events, at least 24 hours before transfer, except that notice may be withheld from an inmate (a) when there is a reasonable cause to believe that it would present a serious threat to the safety and security of the bus or other means of transportation, (b) when population pressures compel a special, unscheduled bus run or other transfer, or (c) in situations where a present or impending emergency requires immediate transfer.

The revised policy seems adequate. Petitioners insist that if the policy is to be accepted at all, it should, nevertheless, be embodied in an injunction because

it was not evolved until respondents were under the pressure of this lawsuit. Counterbalancing that contention is the tardiness of the submission of this issue. Balancing these equities, and relying on the good faith of the respondents, the court finds sufficient the rectification they have formulated and will make no further orders on this subject.

M. LANGUAGE

Petitioners charge that the MCC fails to provide adequate information and services for inmates who speak no English; the main emphasis is on inmates who speak or read only Spanish. The complaint in this aspect must fail as a matter of fact and law.

The evidence adduced on this subject was meager in the extreme. Supplementing the record made by the parties, the court ordered a survey of the language situation, during the trial, with particular reference to inmates of Hispanic origin. The survey, if not minutely accurate, serves adequately for its purposes. It showed that of the 521 inmates in the MCC at the time 110 were of Spanish heritage. Of these, 20 spoke no English and 32 read no English. Five of the latter were also illiterate in Spanish.

Although approximately 24% of the MCC staff speaks Spanish, due to staffing patterns and the fact that inmates who do not speak English are not separately classified, non-English speaking inmates may be assigned to units on which none of the staff speaks their native tongue. The MCC handbook,

"Guidelines for Inmates at the New York Metropolitan Correctional Center," is translated into Spanish and distributed to Spanish-speaking inmates, as are some Bureau of Prisons Policy Statements. In addition, since the commencement of this action, the institution has obtained the services of an interpreter to translate these Statements. Although bulletin board notices are occasionally posted in Spanish, it is not the institution's policy to translate such notes in all, or even most, instances.

Although precise figures are not available as to how many inmates are bilingual, the record and the court's knowledge support a finding that the number is substantial. At least for those who speak or read only Spanish, a translator is likely to be available almost all the time from among staff or fellow inmates. The situation is not ideal, to be sure. But it is sufficient to withstand the proposals of petitioners for revisions by the court.

Petitioners ask the court to order that all printed information provided by the prison to inmates or their visitors be translated into Spanish; that 15% of the books in the general library be Spanish; that the institution hire a Spanish-speaking law librarian; that a Spanish-speaking staff member be assigned to any living unit housing Spanish-speaking inmates; and that an interpreter be made available to any arriving inmate who speaks neither Spanish nor English within 24 hours of arrival to explain institution regulations. The interpreter would be required

to visit the inmate at least every 72 hours and be available as problems arose.

The record provides no basis for any of the relief requested. No witness testified to any instance of prejudice, or even discomfort, because of language barriers. The library list shows a number of titles in Spanish; there is no showing as to why, or for whom, they have been insufficient. There is no evidence that Spanish-speaking staff members are not sufficiently available when it is necessary for staff to communicate with Spanish-speaking inmates. Nor is there any evidence of unmanageable difficulties between inmates for want of sufficient communications.

Without intimating that a filing of these gaps in the record might lead to any different result, the court will dismiss the complaints respecting language problems.

N. GRIEVANCES

Pursuant to Bureau of Prisons Policy Statement No. 2001.6A (10-18-74), the MCC provides procedures for complaints by inmates and responses at ascending levels of the agency. Petitioners assail the prescribed procedures and the practice under them. They seek extensive judicial revisions.

In the first instance, an inmate may present a grievance informally to a member of his unit staff. An informal written complaint, known to all on the inside as a "cop-out," may be sent to the appropriate staff officer. Then, there is a formal written com-

plaint (an "Administrative Remedy Form" or "BP-9"), which requires a response from a staff member within 15 working days. The staff member's determination may be appealed, first to the Regional Office of the Bureau of Prisons, which has 20 working days to reply, and then to the General Counsel of the Bureau, who has 30 working days to reply.

In addition to these procedures, since April 1976, each unit in the MCC has had an inmate committee which meets for the purpose of bringing inmate complaints to the attention of the staff.

Petitioners contend that the stated procedures are constitutionally deficient in that there is no set time in which a staff member must respond to a cop-out (or, in fact, any requirement of an answer at all), and the answer need not be in writing. Should an inmate resort to the formal procedures, the entire process, including appeals, may take 55 working days, or some eleven weeks.

In addition to these difficulties, petitioners note that BP-9 forms are available only from a staff member, who may attempt to discourage the inmate from filing a grievance and propose to solve the problem informally; and it appears that on occasion staff members have in fact refused to give inmates the forms. There are also charges that some staff members have refused to accept BP-9 forms from inmates. Further, a copy of any BP-9 form filed by an inmate is placed in the inmate's central file, and is available to the Parole Commission and other authorities. This, it is argued, will have a chilling

effect on inmates' use of the procedure. Petitioners also challenge the efficacy of the inmate committes. They charge, first, that the committee members are not particularly diligent in soliciting inmate expressions, and, second, that the staff fails to respond to the grievances raised at the meetings.

Building upon the record of expert and other evidence, petitioners seek a substantial catalogue of directives by the court to revise and improve MCC grievance procedures. Specifically, their requests for relief say:

"1. Written grievance procedures

"a. Access to grievance procedure forms should be unrestricted.

"b. All grievance procedure forms describing emergency problems should be answered in writing within 24 hours. All other grievance procedure forms should be answered in writing within three days. All appeals to the regional or national office should be answered in writing within seven days.

"c. No grievance procedure forms or notations as to grievances raised by an inmate should be entered into his central folder or otherwise made available to the parole board or any individual not directly involved in the resolution and response to the grievance.

"2. Elected inmate-staff committees should be established with a right of appeal to an outside individual or group with the power of binding arbitration.

"3. A permanent ombudsman position should be created, with authority to investigate inmate grievances and recommendations, to make suggestions for rule and policy changes, to publicize findings, and to make periodic reports to the Court and/or other interested persons.

"4. Inmates should be advised in advance of all proposed new rules and policies or changes in existing rules or policies and afforded an opportunity to comment on those proposals." [54]

If judgments of policy were for the court, we might institute some or all of the changes petitioners demand. But the court is compelled to conclude that there is neither constitutional nor statutory basis for any of these proposals. However desirable, a grievance procedure is not compulsory for prisons any more than it is in public school faculties, the staff of government agencies, or a host of other places where such devices have been installed. In the rapidly developing field of prison law and policy, the usually forward-looking federal establishment may move soon to follow examples petitioners cite. The court lacks power, however, to compel or accelerate movement of that nature.

There are suggestions in the record that the Bureau's own regulations have been disregarded by MCC personnel in the handling of grievances. But the evidence does not establish any pattern or practice of this nature. And there is no specific case now presented for relief on this score. Obviously, today's decision leaves open individual or even class claims that at some future time violations of applicable regulations are resulting in legal injury to the inmates.

[54] Id. 445.

In this case, however, the prayers with respect to grievance procedures must and will be denied.

O. SANITATION

Under this heading in their lengthy list of complaints, petitioners begin their Post-Trial Memorandum as follows:

> "The record establishes that the food storage, kitchen, and housing and housing areas of MCC are, and have been, infested with vermin." [55]

The assertions on this subject go on to charge that the facility is heavily populated with mice, lice, and other non-humans. It is charged that the place is strewn with food and garbage; that cleaning utensils are frequently missing; that there is a constant lack of toilet paper and paper towels; that new inmates are given dirty blankets and mattresses on arrival; that washing machines are constantly in disrepair; and that there are other, similar outrages.

This is one among several subjects upon which petitioners have allowed themselves to be carried away. The court rejects their allegations as sub-

[55] Id. 171.

stantially without basis in the record. From repeated visits to the MCC and entirely credible testimony, the court finds that the responsible officials in charge and the entire staff of MCC are earnestly and successfully coping with the problems of keeping the institution clean and orderly. It is impossible, as everyone knows, to walk through a public building so densely populated without finding some litter and some objects where they do not belong. On the whole, however, it is clear that the MCC has a highly satisfactory program for maintaining cleanliness and good order, employing both the energies of paid staff and inmates to this vital end.

In sum, without tarrying further over the details, the complaints about sanitation will be dismissed in their entirety.[56]

P. VENTILATION AND TEMPERATURE

Since the MCC opened, there have been significant difficulties with the environmental control system. There is no dispute as to this. It is also undisputed that respondents have sought, and expended substantial amounts of federal funds, to remedy the problems. The system now appears to be operating in a reasonably satisfactory fashion.

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[56] In the multiplicity of our headings and subheadings, the divisions of substantive topics may sometimes be arbitrary and capricious. Under another heading, "Food," the court is ordering measures relating to "Sanitation"—namely, the wearing of gloves and headgear by persons handling food.

Petitioners would have the respondents hire a contractor to inspect and make recommendations concerning the system. The court is not called upon to say whether this is a good idea. Suffice it to say there is no ground for ordering such action.

Q. FURLOUGHS AND JOB INTERVIEWS

Under this heading petitioners complain of practices and omissions which are clearly within the sound discretion of respondent officials.

It is urged that prisoners here on writs, who might have been eligible for furloughs under the standards of the prisons whence they came, are not suitably classified so that they may have furloughs here. But furloughs are surely among the subjects most broadly confided to the judgments of prison officials. Furloughs for writ prisoners, brought here for special and limited purposes, would appear to present particular difficulties and anomalies. The short of the matter is that petitioners have adduced no significant evidence on this subject and have shown no legal basis for any relief.

Equally unsubstantial is the complaint about MCC's reservation and occupational exercise of the power to verify with a prospective employer the fact that a job interview has been scheduled for an inmate seeking a furlough for that purpose. Petitioners are correct, of course, in asserting that prospective employers may have their interest chilled by confirmatory calls of this nature. The record reveals, how-

ever, and the court's experience with this subject reflects, that the prison, parole, and probation personnel, habituated to collaborative efforts on this delicate problem, proceed with a good measure of care and circumspection. The residual power to make a direct check with the employer is a valid incident to respondents' duties. There is no justification for the proposed intrusion by the court.

R. MEDICAL CARE—AN UNRESOLVED ISSUE

Despite the length of this decision and the large number of subjects covered, the case is incomplete in one respect. Petitioners have urged that medical care at the MCC is seriously inadequate. With the concurrence and cooperation of both sides, a medical panel was appointed to study this situation. The panel report was received later than had been expected—or, at least, hoped. Thereafter, unsuccessful efforts were made to resolve the medical issues by agreement. For these and other reasons, the record is incomplete on these issues. It has been agreed and arranged that the gap will be filled in an evidentiary hearing before a Magistrate, sitting as special master.[57]

In the meantime, the case has been pending for a long time, all questions other than those concerning

[57] In visits to the MCC, the court toured and considered the medical and dental facilities, receiving some pertinent information from professional and other personnel. The enlightenment thus acquired may serve, of course, to supplement the Magistrate's report.

medical care are ripe now for decision at this level, and there is a substantial likelihood that one or both sides will wish to appeal the many rulings now ready for review. There is no just reason to delay further either the entry of a final decree here or the beginning of appellate efforts.

Accordingly, counsel for petitioners will serve and file a proposed form of final decree. Respondents will serve and file objections to the proposed form and counter-proposals to substitute for the portions deemed objectionable. These submissions and the court's final decree will be completed with all reasonable speed.

APPENDIX G

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 75 Civ. 6000

UNITED STATES OF AMERICA ex rel.
LOUIS R. WOLFISH et al., RELATORS

v.

UNITED STATES OF AMERICA et al., RESPONDENTS

Jan. 5, 1977

OPINION

FRANKEL, District Judge.

Originally brought by a prisoner, who was transferred long ago but whose name still begins the caption, this action assails a number of conditions in the Federal Metropolitan Correctional Center ("MCC") adjoining this Courthouse. The Federal Defender Services Unit, assigned by the court to represent petitioner class,[1] has pursued an extensive course of discovery, motions for preliminary injunction,[2] and other

[1] An order dated December 2, 1975, certified that the suit could be maintained as a class action pursuant to Fed.R. Civ. P. 23(b)(1) and (2). See *United States ex rel. Wolfish* v. *Levi*, 406 F.Supp. 1243 (S.D.N.Y. 1976).

[2] The court, in preliminary injunctions, has forbidden the narrowing of visiting privileges and a sharp curtailment of access to telephones, both changes having been made or attempted during the pendency of the case.

preparations for a trial which should begin within the next couple of months. In the meantime, claiming some issues are now ready for decision in their favor, petitioners have moved for partial summary judgment. Respondents have made a cross-motion urging that they should have summary judgment now dismissing most of the claims pressed in relators' motion; as to other matters, respondents urge that there are issues of fact requiring a trial. The motions before the court are described and decided as follows; most of the discussion dealing with matters found ripe for decision today, but noting along the way issues postponed for trial.

I.

Designed and billed as a kind of modern showplace among jail facilities when it opened on August 2, 1975, the MCC contains some dormitory accommodations, but was designed mainly to house prisoners in a total of 389 rooms. The overall structure is 12 stories tall. Each floor designed to house prisoners has one or two largely self-contained units of dormitory or room facilities. Within each unit composed of rooms, there are groups of two to six "clusters" (a cluster being a corridor flanked by two rows of rooms), each containing five to eight rooms. The clusters or corridors open onto two-story "multipurpose" or common rooms. The multipurpose areas typically contain chairs, couches, pay telephones, television sets, eating tables, work tables, mail boxes,

exercise apparatus, typewriters, laundry facilities, ping pong and pool tables, and water fountains.

Some of the housing units also have pantries equipped with microwave ovens, drink dispensers, refrigerators, coffee urns, and ice machines. In addition to a toilet and washbasin in each room, there is one shower for each cluster and, on certain floors, additional toilet facilities.

Each housing unit has a visiting room with tables, chairs, couches, and bathroom facilities, and an education area with blackboards and bulletin boards. There is a rooftop recreation area with basketball, volleyball, and handball courts, and gym equipment.

Though built primarily as a pretrial detention center, the MCC also houses state prisoners and others in protective custody, post-conviction sentenced inmates, and youthful offenders. These "non-pretrial" inmates may comprise, on a daily basis, between 40 and 60% of the population.[3]

A major point on which petitioners now seek summary judgment is their complaint against the housing of two people in rooms said to have been inte ed for single occupancy. Respondents say triable issues of fact preclude decision now on this problem. The court has reviewed the extensive papers and exhibits

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[3] Petitioners contest the manner in which respondents classify inmates as "pretrial" or "sentenced." The debate concerns those inmates who are serving state sentences but are currently in MCC awaiting trial on federal charges. Petitioners would class these inmates as "pretrial," respondents as "sentenced." Respondents' version has been taken for present purposes.

addressed to this subject. In addition, while there has been no formal trial, the court has adopted respondents' suggestion and visited the MCC, with counsel for both sides, for the particular purpose of considering the physical facts of double celling. The result is that there appear to be no genuine issues as to facts fairly to be deemed material. The court concludes that petitioners are correct.

It is not disputed that each of the 389 rooms was, in respondents' word, "designated" for occupancy by a single inmate when the MCC first opened. In late November, 1975, however, as the population consigned to the MCC grew at a rate evidently unanticipated at the opening so short a time before, it was decided that some rooms would be used to house two prisoners each. As of the time of this decision, 121 of the rooms have now been "designated" for two inmates.

There are two basic categories of these double-occupancy rooms. By far the larger group—some 100 in all—are rooms with total floor space of 75 to 77 square feet. Each of these contains a double bunkbed (with one or two drawers placed on the floor under the lower bunk), a three-drawer desk, one (or sometimes, two) chairs, a shelf for toilet articles (approximately 2′ x 4″), a wash basin, an uncovered toilet, an extension lamp, and a three-foot book shelf (missing from many of the rooms during the court's visit while wall repairs are being completed). There is no place to hang clothing. The narrow aisle running the length of these rooms provides some 30 to 35 square feet of floor space available to be walked on.

The second category of rooms now used for double occupancy is a group of 21 in a so called honor unit; these are considerably less cramped and somewhat less disagreeably equipped for purposes of double occupancy. These rooms were originally designed as part of the hospital unit.[4] Those which now house two inmates vary in size from a little less than 115 square feet to almost 123 square feet. Each contains two beds, both resting on the floor on adjoining walls to form a right angle; one fluorescent light over both beds, one incandescent light over a sink and open toilet, and two night stands. There is a shelf, approximately 2′ x 8″, placed on the wall about six feet off the floor. Under the shelf are two large plastic hooks suitable for hanging clothing. The inmates in this unit, the "cadre," are sentenced prisoners assigned to serve their terms at the MCC. They are not locked in their rooms at night, many of them having night work assignments.

Respondents cling zealously to the locution that the rooms in the MCC were originally "designated"—not "designed"—for occupancy by a single person. In this formulation, "designated" is meant evidently to denote a kind of optional, discretionary, changeable classification. A room "designated" to hold one person, the thought seems to run, may as easily be "designated" at some other time to hold two. The thought, it must be said, is not pursued beyond two, though

[4] There is a total of 30 such rooms, nine of which are in fact used as infirmary rooms housing one inmate each.

it might readily be if linguistics were our only or primary concern.

The decisive reality, however, not seriously open to debate, is that the rooms were *designed* and built to hold a single person, not more. The conclusion is compelled by an array of undisputed facts. To begin with, petitioners invoke the high authority of the architect who designed the MCC and who, in sworn testimony recorded in this court, has described a room like the ones he drew, housing one inmate, as a "very basic planning principle." Contrasting dormitories with rooms, he went on to say:

> "Dormitories are a much more flexible kind of a thing, you see. That is the only real area in that particular facility. One of the reasons why there's been a tendency to go to single rooms is because it's a very clear and apparent violation of capacity when you try to put two people in a room. You can't put one and a third persons in a room. You can always up the population of a space, in which you put people in, and you can through more imaginative planning get better utilization of the space but there is an absoluteness of a room which is designed for one person, and to try to convert it into a two-person room, it's a clear violation of the capability of that space. There is no question there. There is more than enough, you know, objections to double-celling." [5]

[5] The quoted testimony is from a record made in this court in *Ambrose* v. *Malcolm*, D.C., 414 F.Supp. 485 (1976), involving a state facility. Respondents assail petitioners' reliance

It is not necessary by any means to rely solely on what the architect *said*; the plain visual evidence of what he did demonstrates that the rooms he designed were for one inmate, not two or more. There is no place for each of two people, assigned by others to this unwanted intimacy, to walk or eat or write a letter or be quiet or be outside another's toilet. There is one shelf for toiletries and one for other things, neither adequate for two people. In the larger group of 100 double-celled rooms there is no place to hang a garment. The double-decker bunks by which these rooms have been changed from singles are so constructed that air from a vent, cold during our winter visit, blows out onto the upper bed a foot or so above body level. Many of the prisoners have blocked the

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upon the testimony, generating a fair flurry of learned debate about admissibility of testimony taken in unrelated judicial proceedings and not cross-examined by the parties here, privity of parties, certified copies, Rule 56, Fed.R.Civ.P., and similar specialties. The short of the matter is, however, that the quoted testimony of the architect, Mr. Paul Silver, is patently reliable and not genuinely questioned at all. Respondents, for all the affidavits on file, nowhere suggest any other or different or qualified account they might pit against Mr. Silver's. It pushes dubious technicalities too far to urge that the court must ignore such sworn, tested materials in its own files on a motion for summary judgment—an occasion when an affiant, never cross-examined, may establish a fact to which he swears in writing. Rule 56(c). Fed.R.Civ.P. The time is passed when facts effectively known to a court and not meaningfully contested must be treated as nonexistent. Cf. *Leary* v. *United States*, 395 U.S. 6, 42 n. 81, 43 n. 89, 50 n. 106, 51 nn. 107 and 111, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1968) [citations to record of pretrial hearing in *United States* v. *Adams*, 293 F.Supp. 776 (S.D.N.Y. 1968), as evidence of facts material to *Leary*].

vents to cope with this architecturally unintended unpleasantness. And, as a result the rooms are musty and unpleasant smelling. The single beds originally designed for these rooms each had two drawers built under them, mounted on casters for reasonably convenient use. In the reconstruction to house two inmates, it was found necessary to dismantle these caster arrangements; now each "double" room has one of the old drawers lying loose under the lower bed or none at all for the two assigned occupants.

As the units of formerly single rooms are doubled in occupancy, the multipurpose area for each overall unit displays oppressive consequences. Designed for use by the allotted number of single room occupants, the multipurpose rooms become congested, noisy, unworkable for their intended uses. The recreational equipment, never excessive, is less sufficient. The eating tables are, obviously, less adequate. There is more pressure to eat in the cell, with its single chair, open toilet, and unselected companion.

Taking all the facts together, the court concludes that this case is controlled by the principles of *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F.2d 392 (2d Cir. 1975), and a growing list of decisions condemning double celling as unconstitutional. See also *Benjamin* v. *Malcolm*, 75 Civ. 3073 (S.D.N.Y. May 10, 1976); *Ambrose* v. *Malcolm*, 414 F.Supp. 485, (S.D.N.Y. 1976); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F.Supp. 676 (D.Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), cert. denied, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 189 (1974);

Wayne County Jail Inmates v. *Wayne County Bd. of Comm'rs*, Civ. Action No. 173217 (Cir. Ct. Wayne, Co., Mich. July 28, 1972, and May 25, 1971), aff'd and remanded 391 Mich. 359, 216 N.W.2d 910 (1974); *Commonwealth ex rel. Bryant* v. *Hendrick*, 444 Pa. 83, 280 A.2d 110 (1971). There are, of course, factual differences among the cases. The larger group of rooms involved here, the ones with 75 to 77 square feet, are substantially more spacious than those in *Detainees*, though smaller, it appears, than those in *Inmates of Suffolk County Jail* v. *Eisenstadt*, *supra* (88 square feet). The inmates in the MCC (except for the small cadre of sentenced prisoners who, perhaps oddly, have more freedom than those awaiting trial) are confined to their rooms for shorter periods, some 7½ hours or so daily plus periods of head counts, as against the 14 to 16 daily hours in *Detainees*, though the impact on multipurpose rooms in this case diminishes the difference.[6] The average length of incarceration at the MCC (varying by category of inmate) is between 23 and 65 days, while that in *Detainees* was 16 weeks. The MCC is a far more modern and better decorated building than that involved in *Detainees*. The cells in MCC have doors

[6] An inmate in the MCC is substantially confined to his unit—his room plus his share of the multipurpose room. There is no yard for recreation. There is a rooftop gymnasium of sorts, usable for eight to ten hours a week by each inmate. There is no indoor gymnasium or weight room, no reading room, central dining facility, auditorium, or chapel. Except for members of the cadre, inmates may only leave their modular units when escorted by an MCC officer.

instead of bars, and the common areas are carpeted. All of the residential rooms (with the exception of four cells in the protective custody unit) have an exterior exposure with a window. The comparisons do not uniformly favor the MCC. The jail involved in *Detainees* featured "a gymnasium, a theater auditorium and an enclosed roof recreation area" in addition to "a large variety of activities and programs" (520 F.2d at 396), contrasting notably with the dreary emptiness of the days in the MCC. All in all, however, the federal facility looks better, at least to an outsider.

Emphasizing the relative superiority of the MCC, and warming to the point of comparisons with college dormitories and similar residences, the Warden of the MCC says: "The rooms can accomodate [*sic*] two prisoners comfortably." Moreover, he presents the expertise of a psychiatrist, Dr. Walter William Menninger, who cites a period of service with the Bureau of Prisons and says, after visiting the MCC and reading some of the papers:

> "Based upon my personal observations of conditions at the MCC, my review of the materials described in paragraph 2 above, and my experience in the field of psychiatry, particularly psychiatry as it relates to detention and correctional settings, it is my opinion that "double-bunking" as practiced at the MCC should not have any significant detrimental effects on the physical or psychological health of the inmates at that institution. Some important factors which prompt me to reach this conclusion are

(a) the architectural design and finish of the residential rooms and common areas which convey a non-penal atmosphere and a sense of openness; and (b) the limited period of confinement of any given inmate to the room itself, both in terms of time each day (locked in only for sleeping hours and two court periods), and length of stay (majority of pre-trial inmates are in the MCC 20 days or less). Although the area of some of the residential rooms used for double-bunking may not be ideal, I have not seen any evidence that the "double-celling" practice at the MCC has caused any untoward effects on individual inmates. It does not appear to be psychologically destructive or an unacceptable deprivation of privacy; and there is no evidence it has prompted any increase of deviant sexual or aggressive impulses or tendencies."

There is, as everyone knows, a good deal of contrary expert opinion about the physical and psychological effects of confining two prisoners in one room or cell. See, e.g., *Detainees, supra*, 520 F.2d at 396. With all respect to Dr. Menninger,[7] as well as his fellow professionals in disagreement with him,[8] the

[7] Cf. the possibly distinguishable paragraphs in K. Menninger, *The Crime of Punishment*, at 38-40 (1966).

[8] It scarcely requires a psychiatrist to say it, but our attention has been directed to the testimony of Dr. Augustus F. Kinzel, given before the revered Judge Judd, marking the "humiliation of being locked in with another person, who you * * * may or may not [want] * * * to be locked in with, having to defecate and urinate in his presence * * *." *Volpano* v. *McGrath*, 70 C. 1390, testimony of January 23, 1974 (Tr. 24). Dr. Kinzel went on to describe the tendencies of such

court finds this issue controlled finally by juridical and human criteria that quite transcend the psychiatric debate.

The grounds on which authoritative penological groups and agencies have universally condemned double celling are vividly present here. See *Detainees*, 520 F.2d at 396. The open toilet, at mealtimes and in the middle of the night, remains a stark centerpiece. The fundamental denials of decency, privacy, personal security, and, simply, civilized humanity are all in essence the same when two people are thrown into single prison cells like these. The qualities of threat, nausea, and degradation are visible and palpable for any observer. Given the evolving legal standards of minimum decency defined in cases cited above, the judgment of a lay judge must control the conflicting views of psychiatrists and psychologists, no matter how the opinions are added or multiplied. A court is not required, after all, to litigate over and over again general propositions about matters of human experience that are either self evident or readily demonstrable once for all. We do not take evidence repeatedly that members of the species, often enough to serve as universals, respond unhappily to foul odors, social stigma, humiliation, and denials of minimal privacy. So, here, he who walks slowly and observes can read the uncontradicted evidence of circumstances that the law has now come to de-

confinement to cause alienation, increased suspicion, withdrawal, feelings of helplessness and despair, and forced or traumatic acts of homosexuality. Id. 26-31.

nounce as less than the constitutional minimum for the confinement of fellow human beings.

This conclusion applies to both categories of single rooms involved in this case. The 21 larger rooms in the honor unit (reserved for convicts, not for presumptively innocent detainees) are, to be sure, less blatantly offensive. Nevertheless, each was plainly and unmodifiably designed for one inmate, not two. It remains possible, if extremely unlikely, that single prison rooms somewhere will display "sufficient size and * * * sufficient accommodations to permit double celling without deprivation of a detainee's rights." *Detainees*, *supra*, at 398. As a practical matter, prison authorities, before reaching any such condition, would presumably move (or return) to the use of dormitories, with their greater flexibility and separate toilet facilities. But it is not the court's business to travel very far on such conjectural paths. It is enough to hold, and this court does, that the rooms before us do not rise to the level of possible acceptability for double occupancy.

Respondents stress the thought that the MCC houses sentenced prisoners and inmates from other places brought here on writs as well as pretrial detainees. It is suggested that the conditions in this facility, if unacceptable for detainees presumed to be innocent, may do for those serving terms after conviction. The argument has an air of perverse unreality on the undisputed facts; the only double-bunked rooms at the MCC are being used now for pretrial detainees, and, in one unit, some cooperating witnesses held in protective custody, while the greater privacy and security of single occupancy are enjoyed by sentenced prisoners. Apart from that oddity, and assuming respondents might revise the anomaly, their suggestion is not acceptable. First, the MCC was designed, including its structure of mainly single rooms, for the primary use of pretrial detainees, and that remains its main function. To have an inferior minority of persons housed in ways found unconstitutional for the rest would be a thoroughly deplorable arrangement, fairly to be condemned as cruel and unusual for those affected. There is no indication of how the discrimination would or could be effected without working such an intolerable result. Moreover, it would be sad indeed to have a new and highly publicized federal facility, displayed to the world with supposedly laudable single-room arrangements for presumptively innocent detainees, promptly transformed, at least in part, into a penal slum for persons serving sentences. Having demonstrated in action their judgment that sentences ought not to be served in such conditions, respondents enter quicksand when they seek the court's hypothetical blessing for a possible change of mind and heart.

The federal character of the MCC leads to some further observations of a somewhat preliminary nature which may become more significant as the case proceeds toward a final disposition. Today's condemnation of double celling is amply sustained, in this court's view, by precedents cited above. Most of those precedents relate to *state* jails or prisons. Accidents

of history have caused much of our recent federal jurisprudence governing prison conditions to grow out of cases involving state prisoners. While the pertinent authorities cover this case, it is perhaps permissible to note that the standards we have applied to the states under the Federal Constitution must surely be the barest minimum we can allow for our prisons. In dealing with the latter, our powers (and duties) of supervision may well require more than that minimum. Pressing this notion in concrete terms, petitioners have invoked the Administrative Procedure Act and the specific federal statute defining the obligations of the Bureau of Prisons to "provide suitable quarters" and care, not less than discipline, for federal prisoners, 18 U.S.C. § 402. These may well loom larger as the case progresses. And it may not be wholly irrelevant that the MCC, connected by a third-floor passageway to this building, is a place to which we federal judges consign people who are unable to meet bail conditions that we set.

These thoughts, whether or not they ever become decisive, are to be kept in view as the case progresses. For the moment, the grounds already stated are sufficient to condemn the practice of double celling at the MCC.[9]

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[9] In a related but separate contention, petitioners seek a prohibition against the occasional placement of mattresses or beds in common areas not designed as sleeping quarters. The extent of such assertedly "emergency" arrangements is not clear. The court is not prepared to rule now on whether they have ever been, or should ever be, justified. The situation may also be affected for the future by the elimination of double celling. The problem is left for resolution after trial.

II.

The petitioners assail a Bureau of Prisons rule, applicable at the MCC, which forbids their receipt of books and other written material from anyone on the outside except publishers and book clubs. The rule raises obvious questions of moment under the First Amendment and, in distinguishing between affluent and other inmates, under the due process clause of the Fifth. Recognizing that there are substantial problems, respondents justify the rule as a permissible security device. The attempted justifications are inadequate; the rule must be nullified.

It is said that hard cover books may be used to secrete narcotics and other kinds of contraband. Such concerns—described as "obvious problems of security and administrative responsibility" [10]—comprise the entirety of the supposed grounds for the rule. With no record of untoward experience at places like the MCC, and with no history of resort to less restrictive measures, respondents' invocation of security cannot avail with respect to the high constitutional interests here at stake. It is evident that the enormous amount of literature published in paper or soft covers does not present the danger respondents cite. Yet their rule makes no pertinent discriminations whatsoever.

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[10] Memorandum in Opposition to Motion for Partial Summary Judgment 49.

It is also obvious that the variety of persons confined in the MCC—frequently people who appear to have had no connection with narcotics at all—are a population for whom more selective measures would avail.

Respondents' description of the relatively large MCC library is no ground for validating a restriction against people who may want to read all manner of things not present in that library.

There is a very considerable array of authority outlawing rules like the one now in question. This court follows that body of precedent. *Cruz* v. *Hauck*, 515 F.2d 322, 333 (5th Cir. 1975); *Cruz* v. *Hauck*, 475 F.2d 475, 477 (5th Cir. 1973); *Manicone* v. *Cleary*, 74 Civ. 575 (E.D.N.Y., June 30, 1975); *Detainees of Queens House of Detention* v. *Malcolm*, 73 Civ. 1364 (E.D.N.Y., June 29, 1975) (summary judgment without opinion); *Funches* v. *Malcolm*, 73 Civ. 572 (E.D.N.Y., July 12, 1974); *Rhem* v. *Malcolm*, 371 F.Supp. 594 (S.D.N.Y. 1974); *Collins* v. *Schoonfield*, 344 F.Supp. 257, 281 (D.Md. 1972); *Inmates of Milwaukee County Jail* v. *Peterson*, 353 F.Supp. 1157, 1168-1169 (E.D.Wis. 1973); *Marion County Jail Inmates* v. *Broderick*, 74 Civ. 434 (S.D. Ind., April 12, 1976) (no "books, magazines, or newspapers from any source"); *Cooper* v. *Morin*, Index 1411, 174 (Sup. Ct., Monroe Cy., N.Y., March 21, 1975); *Inmates of Allen County Jail* v. *Bender*, Civ. No. 71 F 32 (N.D.Ind., May 19, 1975) (consent decree); *Lambert* v. *Skidmore*, Case No. C 2 74-135 (S.D.Ohio, June 16, 1975) (consent decree). See also,

Seale v. *Manson*, 326 F.Supp. 1375, 1381-82 (D.Conn. 1971) ("Absolutely no reading material * * * accepted from outside personal parties." Approved magazines from publisher allowed.).

One recent decision, *Woods* v. *Daggett*, 541 F.2d 237 (10th Cir. 1976), is invoked by respondents for their contrary view. That case involved the Leavenworth Penitentiary. In upholding the "publishers only" rule, the court emphasized and re-emphasized that it was dealing with a "maximum security institution containing many dangerous inmates" where there had been a history of "bizarre efforts to carry contraband," including "cards which were found to contain hacksaw blades and drugs concealed within * * * thick paper * * *." *Id.* at 240. The quoted observations would appear to make the cited case distinguishable. It may be noted, however, that contemporary devices for detecting concealed things like hacksaw blades may still make it unnecessary to have so sweeping a ban on materials protected by the First Amendment. In any event, this court concludes that *Woods* v. *Daggett*, which is, of course, not controlling in this Circuit, requires no result different from that being reached today.[11]

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[11] A somewhat similar problem, but lacking in First Amendment concerns, is a rather sweeping prohibition against receipt of foodstuffs and other items. The asserted grounds for this restriction are not impressive. Nevertheless, there is enough in the professed fears of contraband and infection to stay the court's hand until the subject has been explored at trial. Still more sensitive issues are raised concerning allegedly inadequate library facilities and access to printed news

III.

The rooms in the MCC are searched from time to time for varieties of contraband. The petition raises some broad questions about the search procedures and the destruction of alleged contraband seized from the rooms. In their motion for summary judgment, petitioners seek two rulings at this time:

(1) That they should be permitted to observe while their rooms are being searched.

(2) That they should be given receipts for things taken.

The second demand, though vigorously resisted, will be granted now. The first, along with other, broader contentions, must await a fuller factual record for its resolution.[12]

Against the demand for receipts respondents initially made a swift and slightly chilling argument. They said:

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media. Again, however, the court concludes that the nature of the injury, the extent of the deprivation, and the relative burdens petitioners would impose upon the Government are topics requiring a fuller airing than the motion papers provide.

[12] For the right to observe searches petitioners cite Judge Lasker, surely a leading authority in this field, in *Giampetruzzi* v. *Malcolm*, 406 F.Supp. 836, 844-45 (S.D.N.Y. 1975). The cited decision, however, went explicitly on the record of evidence in the case. Respondents here raise arguments of security, search tactics, and administrative necessities requiring a fuller record than we have. On the other hand, respondents' application for summary judgment in their favor is insufficient.

> "Since confiscated contraband is destroyed, except for cash, which is paid into the United States Treasury, * * * it is difficult to see what purpose a receipt would serve, except as a record for disciplinary proceedings. * * * However, that purpose is satisfied by the completion of an incident report in those cases where the contraband is of a sufficiently serious nature to warrant disciplinary proceedings." [13]

When the court called for more enlightenment, respondents expanded on their search and confiscation practices by pointing to regulations which declare, *inter alia*, that:

(1) "Contraband" includes such specified items as narcotics, "[c]urrency, where prohibited," liquor, etc.

(2) "Many other items may be contraband" under a sweeping definition covering anything "not issued by the institution, purchased in the commissary, purchased through approved channels or approved for issue by an appropriate staff member", plus still other things "when found in excessive quantities, or altered from original status."

(3) The searching officer decides what is contraband to be seized.

(4) "Nuisance" contraband may be returned in the discretion of a "Unit Team Member (Unit Manager or Caseworker) or the Chief Correctional Supervisor * * *."

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[13] Memorandum in Opposition to Motion for Partial Summary Judgment 62.

(5) Things not returned are destroyed, except for currency, which goes to the United States Treasury.

The foregoing account, incomplete but sufficient for the time being, is based on Bureau of Prisons regulations embodied in Policy Statements upon which respondents rely as authority for their procedures. Respondents argue that the authority to issue such regulations is clear enough, and there is no quarrel with that general proposition. But regulations, certainly no less than statutes, are subject to the requirements of due process. The vice in the Government's position is that the procedures in question are as extreme in denying due process as they could possibly be.

Whatever minimal property a jail inmate may possess, and however minimal the rights attending that property may be, nobody doubts today that the prisoner is to be protected against seizures without some rudiments of primitive fairness. It is not necessary, though it seemingly will be before this case ends, to forecast the list of such fundamentals—notice, an opportunity to protest, "some kind of hearing," etc.[14] It is enough for now, ruling only on what is properly here, that respondents must be ordered to give receipts for what is taken in searches of the rooms.[15] It is depressing to hear in this time the

[14] See Friendly, *Some Kind of Hearing,* 123 U.Pa.L.Rev. 1267 (1975); cf. Verkuil, *A Study of Informal Adjudication Procedures,* 43 U.Chi.L.Rev. 739 (1976).

[15] When respondents spelled out their views on the seizure and destruction of "contraband," petitioners, in a reply memorandum, found the position "shocking" and demanded in a phrase "a proscription against such destruction or conversion." Reply Memorandum 25-26. But that is in turn too speedy and unconsidered. It is unlikely the court will proscribe totally the "destruction or conversion" of weapons, liquor, narcotics, and other things. The probable crux of the problem will be one of substantive scope and, more importantly, fair procedure. As we move toward and beyond trial, the parties should be formulating their positions in more specific and particularized terms.

solemn contention that minor correctional officers may seize property in unobserved searches, take it away, and then destroy it (or purport to destroy it) without even telling the possessor what they have taken, leaving no possibility of recourse or question concerning their self-regulated judgments (as to whether they actually took anything, as to whether things they took were contraband, what should be destroyed, what may be returned). Now that the contention has been made, for the first time in this court's knowledge, it merits prompt rejection.

IV.

There are several issues concerning mail to and from petitioners. These are ripe for decision now.

(1) Petitioners complain against the requirement that their letters to the outside be placed unsealed in the mailbox for reading at will by correctional personnel. The asserted justifications for this requirement run a gamut from trivial to ludicrous.

It is said inmates may write about escape plans. The supposed concern is dissipated, however, when respondents acknowledge that petitioners are free to

make uncensored telephone calls and to have personal visits without the overhearing of their conversations.

Inmates might seek to mail molds for keys, or money, or other contraband. The molds can be detected without reading the mail. Money and "other contraband" are risks at most *de minimis* when measured against the gross invasions of privacy entailed in the wholesale reading of the mail.

Finally, if it might better have been omitted, the argument is made that "spot-checking the letters to and from sentenced inmates can be extremely helpful in alerting the staff to problems facing * * * inmates or to other matters which may help in evaluating their progress * * *."[16] There is no suggestion of any respectable evidence for this thought. If there were, it would remain a callous claim to rights of intrusion of an intolerably offensive character, degrading in the extreme to those ostensibly viewed with concern. The notion of reading their mail for "evaluating their progress" is uniquely graceless, moreover, when it is tendered for a group consisting mainly of detainees awaiting trial.

Once more, respondents' position is overwhelmed by a considerable weight of authority. See e.g., *Hamilton* v. *Love*, 358 F.Supp. 338, 346 (E.D.Ark. 1973); *Gates* v. *Collier*, 349 F.Supp. 881, 898 (N.D.Miss. 1972), *aff'd*, 501 F.2d 1291, 1310-1314 (5th Cir. 1974); *Obadele* v. *McAdory*, Civil Action No. 72J-

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103(N) (S.D.Miss. 1973); *Kinale* v. *Dowe*, Civil Action # 73-374-GT (S.D.Cal., October 29, 1973); *Marion County Jail Inmates* v. *Broderick*, No. Id. 72-C-424 (S.D.Ind., April 2, 1976); *Lambert* v. *Skidmore, Case* No. C 2 74-135 (S.D.Ohio, June 16, 1975) (consent decree); *Inmates of Allen County Jail* v. *Bender*, Civil No. 71 F 32 ¶ 3 (N.D.Ind., May 1975) (consent decree); *Moore* v. *Janing*, Civil No. 72-0-223 ¶ 11 (D.Neb., March 8, 1973) (consent decree). The court will order that petitioners be freed to seal outgoing mail, subject only to (a) inspection by electronic or other devices to detect hidden objects, without opening the letters, and (b) the power to read contents, in the sender's presence, upon a showing of good cause.

(2) A different result is reached on petitioners' claim concerning mail from attorneys and courts. MCC rules allow "legal" mail to be opened to check for contraband, but not to be read, and only in the presence of the inmates. Petitioners are entitled to no more than this; there is no requirement of good cause for such inspection. *Wolff* v. *McDonnell*, 418 U.S. 539, 574-77, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The partial judgment now to be entered will favor respondents in this respect.

(3) Finally, there is the question of incoming mail from persons other than attorneys and legal officials. This is at least as subject to scrutiny as "legal" mail. It is clear, therefore, that this category of mail may be opened to screen out contraband. Moreover, the administrative burden of doing this in the

inmates' presence would be severe beyond the demands of privacy petitioners understandably urge. At the same time, the paper submissions and the court's direct knowledge of the MCC make it plain that there can be no sound reason for allowing correctional personnel routinely to *read* incoming letters. The worry about mailed escape plans, given the physical situation and other means of communication, is a trivial rationalization. The offensive desire to search out personal problems has been sufficiently answered earlier. Nothing substantial supports the invasion by officials of the privacies in letters to people awaiting trial or sentenced to relatively short terms in the secure confines of the MCC.

Balancing the several interests, the court will order that (a) non-legal mail addressed to petitioners at the MCC may be opened and searched for contraband, (b) without probable cause or the recipients' presence, but (c) with the firm understanding, to be enforced with rigor, that the contents are not to be read, except on a showing of good cause, and then only in the recipient inmate's presence. Petitioners question that the last of these directives is meaningful. How, they ask, can they trust the correctional people to refrain from reading the mail? It is naive to doubt that the question is legitimate. Nevertheless, the response must be the kind of naivete required of judges; until or unless the contrary is shown, the presumption of official regularity must remain significant in the apparatus of Government. It is to be expected that those in charge of the MCC will make the most vigor-

ous efforts to enforce the prohibition now ordered, and to impose due sanctions for its violation. If the court's presumptions and expectations prove unfounded, further measures may be necessary. In the meantime, as stated, the adjustment now ordered seems just and appropriate in light of the constitutional principles governing the problem.

V.

To summarize: Upon the cross motions before the court, petitioners are entitled to a partial decree enjoining (a) double celling, (b) enforcement of the "publishers only" rule, (c) failure to give receipts for seized property, and (d) the practices respecting mail hereinabove found to be invalid. Respondents are entitled to dismissal of the claims as to mail which have been rejected. As to the first item, double celling, some limited but reasonable time should be allowed to complete compliance, though action toward that end should begin immediately. Cf. *Detainees, supra*, 520 F.2d at 394-95. The other rulings are capable of enforcement, and should be enforced, within the next week or 10 days.

Accordingly, petitioners should serve and file a proposed form of decree on or before January 10, 1977. Respondents should respond not later than January 13, indicating any specific objections they may have to petitioners' proposed decree and offering substitute language where there are such objections. Petitioners may reply on or before January 17, 1977, whereupon a decree will be formulated and entered.

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